90-831

Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF

THE UNITED STATES

October Term, 1990

JERRY P. CAWLEY, Petitioner

-vs-

STEVEN MULLER, et al.,

Respondents

PETITION FOR WRIT OF CERTIORARI

To the Michigan Supreme Court

Submitted By:

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the state courts' holding below incorrectly construes and applies the U.S. Congress's two express statutory exceptions to valid 17 USC 301(a) U.S. Copyright Act preemption--(1) the 17 USC 301(b)(1) exception to preemption whenever the claimed state right at issue arises OUTSIDE the 17 USC 501, 28 USC 1338(a) exclusive subject matter jurisdictional ambit of the Copyright Act delimited by 17 USC 102, 103; and/or (2) the 17 USC 301(b)(3) exception to preemption whenever the claimed state right at issue is NOT equivalent to any of the expressly ennumerated statutory 17 USC 106 rights exclusively regulated by the U.S. Copyright Act--in diamissing for lack of constitutionally valid sub-

ject matter jurisdiction due to 17 USC 301(a) U.S. Copyright Act preemption the following nine (9) common law and/or statutory State of Michigan law claims for relief--all of which, but for preemption, were suitable (if not proven) for routine state adjudication on merits:

1) the Count 1 non-performance of co-authors' unitary 17 USC 201(a) agreement accepting commission to subsequently create a copyright as to ownership rights, licenses, authorship attribution credit line rights, labor fees and costs fees, et cetera;

2) the Count 2 non-performance of a rather standard publications/marketing agreement consented to prior to the creation of any copyrights;

3) the Count 3 breach of a commiss-

ioning contract derived state covenant duty not to compete with the U.S. N.S.F./ M.F.O.A. joint venture funding and otherwise sponsoring the commissioning of the implicated contracts and copyrights;

4) the Count 4 negligent performance of commissioning joint venture contract derived duties of fiduciary care and of trust owed to Petitioner Cawley;

5) the Count 5 state law quantum meriut recovery claim for services rendered and costs accrued alternative relief claim to Count 1;

6) the Count 6 state law claim for tortious interference by third party, ultra vires acting joint venturer, with in place joint venture contract advantages and reasonable expectations;

7) the Count 7 state law trespass claim for illicit accessing of confidential scholarship trade secrets "research banks" materials, including 17 USC 202 items and 17 USC 102(b) idea contents items;

8) the Count 8 reiteration of Count seven under state conversion claim, based on dispossession of chattels involved; and

9) the Count 9 Michigan Consumer Protection Act (MCLA 445.901 et seq; MSA 19.418(1) et seq) CONSUMER standing to sue claim, seeking individual rights consumer mechanism for enforcing legally U.S. scholarship trade (U.S. Government endorsed; 45 CFR 76, 689) customs of MINIMUM fair trade practices (rights NOT based on competitor standing to sue, as under 15 USC 1125(a), but on trade consumer "rights" to honest dealings)?

2. Whether, mindful of the Question 1 issues, reversal of the state courts' holdings below is mandated by both the patent, palpably wrong 17 USC 301 test and the Reason 17 (within) explained state trial court premising factually of the holding below on the existence of a NON-EXISTENT University of Michigan Press 1980 book by Anton-with-Cawley, which the trial court held to exist wrongly--at issue was simply a still unpublished TXu 333-410 Anton with Cawley manuscript that was commissioned by the held preempted state contracts, absent any further "press publication" that might even arguably "satisfy" the underlying contract disputes?

3. Whether, if reconsideration of the lower courts' 301(a) preemption dismissal is granted and the 301(a) holding is

revised, the lower state courts' further, "advisory" claim statement holdings ought to be vacated and remanded for reconsideration in light of proper 17 USC 301 holding and proper factual holdings (correcting other improper lower court constructions/applications of Copyright Act provisions that inherently lead to incorrectly distilled factual construction of the nine state claims)?

4. Whether, since the 17 USC 301(a) holding below also serves as a held defense in simultaneous federal action 87-70017-DT;90-1981 now pending on completed briefs before the 6th Circuit, this Court ought to simultaneously hear both these state and federal actions (reserving 90-1981 normal appeal rights) as to 301(a) bases of res judicata?

LIST OF PARTIES

The parties to the proceedings below are as follows:

The sole petitioner is Jerry P. Cawley.

The respondents are five (5) in number:

1) Thomas J. Anton, private individual party;
2) Trudi C. Miller, private individual party;
3) Steven Muller, personally served, but representing the Office of The President of Johns Hopkins University and, thus, Johns Hopkins University Press and its agents;
4) Howard Swearer, personally served, but representing the Office of The President of Brown University and

its agents;

5) The Board of Regents, The University of Michigan body corporate.

At and after the time of the events in question in this State of Michigan action 87-032631-CK;104130;87745, Trudi C. Miller was employed as a United States National Science Foundation program officer (later, director) before leaving NSF at or about 1985-86. However, she is sued herein in her private individual capacity since a formal NSF Conflict-Of-Interests 9-17-81 administrative ruling governing Federal Torts Claim Act and related matters (initiated by Miller as required by NSF rules) declared her conduct and its consequences at issue in this action to be OUTSIDE the scope of her

authorized NSF employment duties.

In a simultaneous federal action, described within in the "Collateral Federal Court Opinions" section appended to the "Opinions Below" section, the NSF Defendant formally pronounced Miller's conduct and consequences her private concern; the U.S. Department of Justice is NOT representing Miller. See 5-17-88 Federal Defendant Bloch's Motion To Dismiss Or Grant Summary Judgment supporting Brief, especially Exhibit G-1, the 9-17-81 NSF COI administrative ruling, in Cawley v. Swearer, United States District Court, Eastern District Of Michigan, action # 87-70017-DT; on appeal upon completed briefing to the United States Court Of Appeals for the Sixth Circuit, action # 90-1981.

TABLE OF CONTENTS

Section	Page
QUESTIONS PRESENTED FOR REVIEW..	1
LIST OF PARTIES	vii
TABLE OF CONTENTS	x
TABLE OF AUTHORITIES	xxiii
OPINIONS BELOW	2
COLLATERAL FEDERAL COURT OPINIONS	7
JURISDICTION	9
CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED	10
STATEMENT OF THE CASE	11
TIME WHEN THE FEDERAL QUESTION FIRST AROSE IN THE STATE COURT PROCEEDINGS BELOW AND CIRCUMSTANCES	16

TABLE OF CONTENTS

Section — Page

REASONS FOR GRANTING THE WRIT 16

REASON # 1:

--THE MICHIGAN STATE COURTS' HOLDING BELOW DECIDES (INCORRECTLY) WHAT ALL JUDGES, LAWYERS AND COMMENTATORS AGREE IS THE SINGLE MOST IMPORTANT FEDERAL QUESTION CONCERNING THE U.S. COPYRIGHT ACT STILL LEFT (LAMENTABLY) UNADDRESSED DIRECTLY BY THIS COURT: THE 17 USC 301 PREEMPTION TEST ISSUE. 17

REASON # 2:

--ABSCENT A DIRECT RULING CLARIFYING THE 17 USC 301 PREEMPTION TEST BY THIS COURT, JUDICIAL CONFUSION, CONFLICTING INTERPRETATIONS AND AD HOC (IF NOT,

TABLE OF CONTENTS

Section Page

AS HEREIN, UNJUST) DISPOSITIONS OF 17 USC 301 FEDERAL QUESTIONS WILL CONTINUE TO BEDEVIL FEDERAL AND STATE LITIGATION ACROSS THE NATION, NEEDLESSLY CHILLING 1ST AMENDMENT RIGHTS TO COURT ACCESS FOR MERITS DETERMINATION OF CLAIMS IN ACCORDANCE WITH APPRO-PRIATE COURT RULES BY VIRTUE OF (1) DISCOURAGING THE LIMITED SEGMENT OF THE "LOCAL BAR" TRULY EXPERT IN INTELLECTUAL PROPERTY LAW FROM ASSUMING REPRESENTATION DUTIES ON CONTINGENCY FEE BASES, (2) COERCING LITIGANTS TO DROP OTHERWISE PROPER CLAIMS FOR WANT OF LEGAL REPRESENTATION, OR (3) FORCING LITIGANTS TO ACT PRO PER

TABLE OF CONTENTS

Section Page

IF THEY LACK SUFFICIENT MONETARY RESOURCES TO HIRE TRULY EXPERT COUNSEL, BUT DO NOT WISH TO FORSAKE PROPER CLAIMS OR GET UNHAPPILY ASSOCIATED WITH THE FRINGE ELEMENT OF THE LOCAL BAR THAT, HAVING A LICENSE, WILL FOR SMALL FEE WILL TAKE ANY CASE, REGARDLESS OF THEIR TRUE SUBJECT MATTER COMPETENCY. 21

REASON # 3:

--CARDINAL FEDERAL INTERESTS IN MAINTAINING A CONTINUING CONSTRUCTIVE COMITY RELATIONSHIP BETWEEN FEDERAL AND STATE COURT SUBJECT MATTER DOMAINS AND ADJUDICATION PRACTICES ARE DIRECTLY AND DETRIMENTALLY LAID BARE BY THE MICHI-

TABLE OF CONTENTS

Section — Page

GAN STATE COURTS' HOLDING BELOW, THEREBY RECOMMENDING A HOLDING BY THIS COURT IN ORDER TO PROPERLY UMPIRE THE CONTINUING WORKINGS OF THE UNITED STATES FEDERAL COURT SYSTEM. 24

REASON # 4:

--THE MICHIGAN STATE COURTS' HOLDING IS INCONSISTENT WITH CONGRESS'S EXPRESS PURPOSE IN ENACTING THE U.S. COPYRIGHT STATUTE AND ITS KEYSTONE 17 USC 301 PREEMPTION TEST, IN LIGHT OF CONGRESS RECOGNIZED 9TH AND 10TH AMENDMENT RESERVED COMPLEMENTARY STATE LAW BASED RIGHTS AND OBLIGATIONS, AND U.S. TREATY OBLIGATIONS UNDER THE BERNE

TABLE OF CONTENTS

Section Page

CONVENTION. 26

REASON # 5:

--THE MICHIGAN STATE COURTS' HOLDING IS "PLUM CONTRARY" TO A PROPER PLAIN LANGUAGE CONSTRUCTION OF THE 17 USC 301 PREEMPTION TEST AND EQUALLY CONTRARY TO THE PROPER PLAIN LANGUAGE CONSTRUCTION OF OTHER, COMPLEMENTARY PROVISIONS OF THE COPYRIGHT ACT IMPLICATED WITHIN ANY PREEMPTION TEST--i.e., 17 USC 102, 103, 106, 201, 204, 205, 411, 501--AS INDICATED BY U.S. CONGRESSIONAL REPORTS. 27

REASON # 6:

--THE MICHIGAN STATE COURTS' HOLDING IS INCONSISTENT WITH

TABLE OF CONTENTS

Section — Page

EXISTENT COPYRIGHT ACT HOLDINGS BY THIS COURT, ESPECIALLY "CCNV V. REID", 490 US---, 109 S Ct ---, 104 L ED 2d 811 (1989). 29

REASON # 7:

--THE MICHIGAN STATE COURTS' HOLDING CONFLICTS WITH REPORTED U.S. COURTS OF APPEAL OPINIONS ADDRESSING WHETHER THE COUNT 1 STATE CONTRACT LAW RIGHT CLAIMS ARE SUBJECT TO PREEMPTION UNDER THE 17 USC 301 U.S. COPYRIGHT ACT PROVISION. 30

REASON # 8:

--THE MICHIGAN STATE COURTS' HOLDING CONFLICTS WITH REPORTED U.S. COURTS OF APPEAL OPINIONS ADDRESSING WHETHER THE COUNT 2

TABLE OF CONTENTS

Section Page

STATE COMMISSIONING OF THE CREATION OF A COPYRIGHT FOR EXCLUSIVE PUBLICATION INCLUSION WITHIN A SPECIFIC COLLECTIVE WORK CONTRACT LAW RIGHT CLAIMS ARE SUBJECT TO PREEMPTION UNDER THE 17 USC 301 U.S. COPYRIGHT ACT PROVISION. 42

REASON # 9:

--THE MICHIGAN STATE COURTS' HOLDING CONFLICTS WITH REPORTED U.S. COURTS OF APPEAL OPINIONS ADDRESSING WHETHER THE COUNT 3 CONTRACT DERIVED STATE COVENANT DUTY NOT TO COMPETE CLAIMS ARE SUBJECT TO PREEMPTION UNDER THE 17 USC 301 U.S. COPYRIGHT ACT PROVISION. 44

TABLE OF CONTENTS

Section Page

REASON # 10:

--THE MICHIGAN STATE COURTS' HOLDING CONFLICTS WITH REPORTED U.S. COURTS OF APPEAL OPINIONS ADDRESSING WHETHER THE COUNT 4 NEGLIGENT PERFORMANCE OF STATE CONTRACT ASSUMED DUTIES CLAIMS ARE SUBJECT TO PREEMPTION UNDER THE 17 USC 301 U.S. COPYRIGHT ACT PROVISION. 46

REASON # 11:

--THE MICHIGAN STATE COURTS' HOLDING CONFLICTS WITH REPORTED U.S. COURTS OF APPEAL OPINIONS ADDRESSING WHETHER THE COUNT 5 STATE LAW QUANTUM MERIUT CLAIMS FOR SERVICES RENDERED AND EXPENSES ACCRUED RECOVERY ARE

TABLE OF CONTENTS

Section Page

SUBJECT TO PREEMPTION UNDER THE 17 USC 301 U.S. COPYRIGHT ACT PROVISION. 48

REASON # 12:

--THE MICHIGAN STATE COURTS' HOLDING CONFLICTS WITH REPORTED U.S. COURTS OF APPEAL OPINIONS ADDRESSING WHETHER THE COUNT 6 STATE LAW CLAIMS FOR THIRD PARTY ULTRA VIRES ACTING JOINT VENTURER TORTIOUS INTERFERENCE WITH IN PLACE CONTRACT/BUSINESS ADVANTAGES ARE SUBJECT TO PREEMPTION UNDER THE 17 USC 301 U.S. COPYRIGHT ACT PROVISION. 50

REASON # 13:

--THE MICHIGAN STATE COURTS' HOLDING CONFLICTS WITH REPORTED

TABLE OF CONTENTS

Section Page

U.S. COURTS OF APPEAL OPINIONS ADDRESSING WHETHER THE COUNT 7 STATE LAW TRESPASS TO SCHOLARSHIP TRADE CONFIDENTIAL RESEARCH BANKS "TRADE SECRETS" CLAIMS ARE SUBJECT TO PREEMPTION UNDER THE 17 USC 301 U.S. COPYRIGHT ACT PROVISION. 52

REASON # 14:

--THE MICHIGAN STATE COURTS' HOLDING CONFLICTS WITH REPORTED U.S. COURTS OF APPEAL OPINIONS ADDRESSING WHETHER THE COUNT 8 STATE LAW CONVERSION OF SCHOLARSHIP TRADE CONFIDENTIAL RESEARCH BANKS "TRADE SECRETS" CLAIMS ARE SUBJECT TO PREEMPTION UNDER THE 17 USC 301 U.S. COPYRIGHT ACT

TABLE OF CONTENTS

Section Page

PROVISION. 57

REASON # 15:

--THE MICHIGAN STATE COURTS' HOLDING CONFLICTS WITH REPORTED U.S. COURTS OF APPEAL OPINIONS ADDRESSING WHETHER THE COUNT 9 STATE CONSUMER PROTECTION ACT STATUTORY KIND OF CLAIM IS SUBJECT TO PREEMPTION UNDER THE 17 USC 301 U.S. COPYRIGHT ACT PROVISION. 58

REASON # 16:

--THE MICHIGAN STATE COURTS' HOLDING CONFLICTS WITH REPORTED STATE COURT HOLDINGS APPLYING THE 17 USC 301 U.S. COPYRIGHT ACT PREEMPTION TEST, INCLUDING AT LEAST IMPLICITLY THE ONLY

TABLE OF CONTENTS

Section Page

REPORTED STATE OF MICHIGAN CASE THAT PETITIONER PRO PER IS AWARE OF. 60

REASON # 17:

--MINIMUMLY, THIS COURT OUGHT TO EXERCISE ITS SUPERVISORY POWERS TO REMEDIALLY CORRECT THE PLAIN FACTUAL AND LEGAL ERRORS REGARDING THE U.S. COPYRIGHT ACT 17 USC 301 PREEMPTION TEST MANIFEST IN THE MICHIGAN STATE COURTS' HOLDING BELOW, AS ENNUMERATED BRIEFLY WITHIN. 62

CONCLUSION 64

A PRO PER'S RELIEF REQUEST 64

SIGNATURE 65

TABLE OF AUTHORITIES

Item Page(s)

PART A--TABLE OF CASES

Acorn Structures, Inc v. Swantz, 657 F Supp 70, 26,116 1987 CLD 21,109 (WD Wa Char Div 1987), rev'd, ___ F2d ___, 26,251 1988 CLD 21,739-4 (4th 1988)..... 35

Allied Artists Pictures Corp v. Rhodes, 496 F Supp 408 (SD Ohio ED 1980), aff'd, 679 F2d 656 (6th 1982)..... 37, 59

Angel Music, Inc v. ABC Sports, Inc, 25,923 1986 CLD 20,227 (SD NY 1986).... 39

Aronsón v. Quick Point Pencil Company, 440 US 257, 99 S Ct

TABLE OF AUTHORITIES

Item — Page(s)

1096, 59 L Ed2d 296 (1979)... 20

Arthur Young & Co v. City Of Richmond, 895 F2d 967 (4th 1990)..... 25, 36

Associated Film Dist Corp v. Thornburgh, 683 F2d 808 (3rd 1982) 59

Balboa Ins Co v. Trans Global Equities, 267 Cal Rptr 787 (CA Calif 3rd Dist 1990)..... 45, 47, 56, 61

Ballas Buick-GMC v. Taylor Buick, 25,550 1983 CLD 18,239 (C Pl Ct Lucas Cnty Ohio 1981)..... 59-60

Baltimore Orioles v. Major League Baseball Players, 805 F2d 663 (7th 1986), cert den, ___ US ___, 107 S Ct 1593,

TABLE OF AUTHORITIES

Item — Page(s)

___ L Ed2d ___ (1987) 41

Boddie v. Connecticut, 401 US 371, 91 S Ct 780, 28 L Ed2d 113 (1971)..... 22

Brignoli v. Balch Hardy And Scheinman, Inc, 645 F Supp 1201 (SD NY 1986) 49

Bromhall v. Rorvik, 478 F Supp 361 (ED Pa 1979) 45

Burnett v. Warner Bros Pictures, 25,761 1985 CLD 19,417 (NY Sup Ct NY Cnty Spec Term 1985) 43

CCNV v. Reid, 846 F2d 1485 (DC Cir 1988), aff'd, 490 US ___, 109 S Ct 2166, 104 L Ed2d 811 (1989) 26, 28, 29, 34, 49

TABLE OF AUTHORITIES

Item — Page(s)

Carter v. Bailey, 64 Me 458 (SC Maine 1874) 32-33

Cawley v. Swearer, et al., United States District Court, Eastern District of Michigan, Judge Gadola, 87-70017-DT, June 19, 1990; on appeal to the United States Court Of Appeals for the Sixth Circuit, 90-1981 7,16,24

Crow v. Wainwright, 720 F2d 1224 (11th 1983), cert den, 469 US 819, 105 S Ct 89, 83 L Ed2d 35 (1984) 28

Custom Import Inc v. Hanmee Trading Co, Inc, 596 F Supp 1126 (SD NY 1984) 39

Del Madera Properties v. Rhodes

TABLE OF AUTHORITIES

Item | Page(s)

And Gardner, Inc, 820 F2d 973 (9th 1987) 61

Donald Frederick Evans v. Continental Homes, Inc, 758 F2d 897 (11th 1986) 60

Dufau v. Creole Engineering, Inc, 465 So2d 752 (La App 1985) 37

Dumas v. Gommerman, 865 F2d 1093 (9th 1989) 26, 38

Effects Associates, Inc v. Cohen, 817 F2d 72 (9th 1987); 908 F2d 555 (9th 1990)..... 38

Ehat v. Tanner, 780 F2d 876 (10th 1985) 41

Fantastic Fakes, Inc v. Pickwich Intern, Inc, 661 F2d 479 (5th Unit B 1981) 45

TABLE OF AUTHORITIES

Item — Page(s)

Field Enterprises v. Dept Of Treasury, ___ Mich App ___, 457 NW2d 113 (CA Mi 1990).... 61

Garrido v. Burger King Corp, 558 So2d 79 (CA Fla 3rd 1990) 60, 62

Gilliam v. ABC, 538 F2d 14 (2d 1976)..... 39

Gladstone v. Hillet, 26,336 1988 CLD 22,157 (CA Calif 1st Dept 1988)....., 55

Granz v. Harris, 198 F2d 585 (2d 1952)..... 31

H_2O Swimwear v. Lomas, 560 NYS2d 19 (SC NY App Div 1st 1990)..... 51, 62

Haines v. Kerner, 404 US 519, 92 S Ct 594, 30 L Ed2d 652 (1972) 22-23

Hal Roach Studio v. Richard

TABLE OF AUTHORITIES

Item — Page(s)

Feiner & Co, 896 F2d 1542 (9th 1990) 38

Harper & Row Publishers, Inc v. Nation Enterprises, 501 F Supp 848 (SD NY 1980), aff'd, 723 F2d 195 (2d 1983), rev'd and rem'd, 471 US 539, 105 S Ct 2218, 85 L Ed2d 588 (1985)... 28, 37, 40

International News Service v. Associated Press, 248 US 215, 39 S Ct 68, 63 L Ed2d 211 (1918) 57

Kelley v. April Music, 26,237 1988 CLD 21,693 (SD NY 1988). 39

Kewanee Oil Co v. Bicron Corp, 416 US 470, 94 S Ct 1879, 40 L Ed2d 315 (1974)..... 20

TABLE OF AUTHORITIES

Item — Page(s)

Korman v. Iglesias, 736 F Supp 261 (SD Fla 1990)..... 49

Locke v. Times Mirror Magazine, Inc, 25,750 1985 CLD 19,368 (SD NY 1985) 32, 39

M Bryce & Assoc, Inc v. Gladstone, 107 Wisc2d 241, 319 NW2d 907 (CA Wisc 1982), cert den, 459 US 944, 103 S Ct 258, 74 L Ed2d 201 (1982)..... 61

MGB Homes, Inc v. Ameron Homes Inc, 903 F2d 1486 (11th 1990) 41

Mills Music, Inc v. Snyder, 469 US 153, 105 S Ct 638, 83 L Ed2d 556 (1985) 29

Nash v. CBS, Inc, 899 F2d 1537 (7th 1990)..... 45

TABLE OF AUTHORITIES

Item — Page(s)

Oddo v. Ries, 743 F2d 630 (9th 1984)..... 38, 49

Peckarsky v. ABC, Inc, 603 F Supp 688 (D DC 1984)..... 35

Random House, Inc v. Gold, 464 F Supp 1306 (SD NY 1979), aff'd without opinion, 607 F2d 998 (2d 1979)..... 42

Ronald Litoff, Ltd v. American Exp Co, 621 F Supp 981 (SD NY 1985)..... 39

Salinger v. Random House, Inc, 811 F2d 90 (2d 1987), cert den, ___ US ___, 108 S Ct 213, 98 L Ed2d 177 (1987)..... 39-40

Schuchart & Assoc v. Solo Serve Corp, 540 F Supp 928 (WD Tx SA Div 1982)..... 49

TABLE OF AUTHORITIES

Item — Page(s)

Smith v. Weinstein, 578 F Supp 1297 (SD NY 1984), aff'd without opinion, 738 F2d 419 (2d 1984)..... 37, 39

Stack v. Marcum, 147 Mich App 756, 382 NW2d 743 (1985).... 50

Stepdesign, Inc v. Research Media, Inc, 442 F Supp 32 (SD NY 1977)..... 31

T B Harms Co v. Eliscu, 339 F2d 82 (2d 1964), cert den, 381 US 915, 85 S Ct 1534, 14 LEd2d 435 (1965)..... 25

Taquino v. Teledyne Monarch Rubber, 893 F2d 1488 (5th 1990)..... 36, 45, 60

Topolos v. Caldeway, 698 F2d 991 (9th 1983) 38

TABLE OF AUTHORITIES

Item — Page(s)

Trust Co Bank v. MGM/UA Enter Co, 772 F2d 740 (11th 1985).. 41

Uncle Jam Records v. Warner Bros, 25,580 1983 CLD 18,428 (SD NY 1983) 51

Universal Gym Equipment, Inc v. Atlantic Health & Fitness Products, 229 USPQ 335 (D Md 1985) 37

Valente-Kritzen Video v. Pickney, 881 F2d 772 (9th 1989).. 60

Van Dusen v. Southeast First National Bank Of Miami, 25,853 1985 CLD 19,890 (CA Fla 1985) 62

WGN Continental Broad Co v. United Video, 693 F2d 622 (7th 1982)..... 41

TABLE OF AUTHORITIES

Item	Page(s)
Weissmann v. Freeman, 868 F2d 1313 (2d ____), cert den, ___ US ___, 110 S Ct 219, 107 L Ed2d 172 (1989).....	49
Whitfield v. Lear, 582 F Supp 1186 (ED NY 1984), rev'd and rem'd, 751 F2d 90 (2d 1984).	39
Wolfe v. United Artists Corp, No 80-6957 (SD NY 7-21-83), aff'd without opinion, 742 F2d 1439 (2d 1983).....	32, 39
Wolfe v. United Artists Corp, 583 F Supp 52 (ED Pa 1983)..	32, 39
Worth v. Worth, 195 Cal App 3rd 768, 26,208 1988 CLD 21,524 (CA Calif 1st 1987)	61
Zim v. Western Publishing Co, 573 F2d 1318 (5th 1978)	37-38, 42

TABLE OF AUTHORITIES

Item — Page(s)

PART B--U.S. CONGRESSIONAL REPORTS

H R Rep No 1476, 94th Cong, 2d Sess 1, 5 US Code Cong & Ad News 5659 (1976) 26, 33, 34

Sen Rep No 100-352, 100th Cong, 2d Sess 1, 6 US Code Cong & Ad News 3706 (1988)..... 33

PART C--AMERICAN LAW INSTITUTE

Restatement (2d) Of Torts,

--Section 321 56

--Section 322 56

PART D--COMMENTATORS

Chisum, The Allocation of Jurisdiction Betweem State and Federal Courts in Patent Litigation, 46 Wash L R 633 (1971)..... 25

TABLE OF AUTHORITIES

Item	Page(s)
A. Latman, R. Gorman, J.C. Ginsberg, eds., Copyright For The Eighties (Va 1985 2nd ed).....	17-18, 20
Melvin B. Nimmer, et al., Nimmer On Copyright (1987 ed).....	25, 33, 37
U.S. National Academy of Science, On Becoming a Scientist (Washington, D.C., 1989).....	58
C. Wright, A. Miller, E. Cooper, Federal Practice & Procedure	25

PART E--OTHER

TABLE OF AUTHORITIES

Item	Page(s)
U.S. Constitution	
--1st Amendment	26
--9th Amendment.....	26, 27
--10th Amendment.....	26, 27
U.S. Statutes	
15 USC 1125(a).....	16, 33, 34, 59
17 USC 101	10, 10(g)-10(j)
17 USC 102	10, 10(b)-10(c), 28, 30, 32
17 USC 102(b).....	45
17 USC 103.....	10, 10(c), 28, 30, 32
17 USC 103(a).....	15

TABLE OF AUTHORITIES

Item	Page(s)
17 USC 106.....	10(d), 28, 30, 31, 43
17 USC 201	10, 10(d)-10(f), 27, 30
17 USC 201(a).....	11, 15, 33
17 USC 201(c).....	11, 31
17 USC 301.....	10, 10(a)-10(b), 17, 18, 19, 21, 24, 25, 26, 27, 28, 29, 30, 42, 44, 46, 48, 50, 52, 57, 58, 60, 62
17 USC 301(a).....	2, 4, 5, 14, 15, 16, 19,

TABLE OF AUTHORITIES

Item	Page(s)
	24, 27, 28, 30, 32, 34, 41, 43, 63, 64
17 USC 301(b)(1).....	19, 25, 28, 29, 32, 36, 47, 56, 59
17 USC 301(b)(3).....	19, 25, 27, 28, 29, 32, 36, 47, 56, 59
17 USC 501.....	10, 10(f)-10(g), 16
28 USC 1257(3)	9
28 USC 1338(a)	25
Berne Convention Implementation Act Of 1988, PL 100-568, HR 4262, October 31,	

TABLE OF AUTHORITIES

Item	Page(s)
1988, 100th Congress, 2nd Sess, 102 Stat 2853, 2853-2854 (1988).....	10(j)-10(k), 33
Trademark Revision Act Of 1988, PL 100-667, 102 Stat 3935	33-34
State of Michigan	
MCLA 445,901 et seq;MSA 19.418(1) et seq.	10(k), 58
U.S. Government Rules	
45 CFR 76	11, 13-14, 58
45 CFR 689.....	11, 14, 58
Court Rules	
USSC Rule 14.1(a).....	7
MCR 2.116(C)(4)	5
MCR 2.116(C)(8)	5
MCR 2.116(I)(5)	5

No. _____

IN THE SUPREME COURT OF

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October Term, 1990

JERRY P. CAWLEY, Petitioner

-vs-

STEVEN MULLER, et al.,

Respondents

PETITION FOR WRIT OF CERTIORARI

To the Michigan Supreme Court

The petitioner, Jerry P. Cawley, prays that a Writ Of Certiorari issue to review the August 27, 1990 Order of the Michigan Supreme Court denying a timely motion for reconsideration of the Michigan Supreme Court June 26, 1990

Order denying a delayed application for leave to appeal from a prior August 4, 1989 unpublished Memorandum Opinion of a Michigan Court Of Appeals panel affirming, albeit with added emphasis on the threshold lack of valid constitutionally required subject matter jurisdiction within the State Of Michigan courts due to 17 USC 301(a) U.S. Copyright Act preemption bases of dismissal, the initial State Circuit Court trial level September 28, 1987 Order Of Dismissal based on its September 15, 1987 unpublished Opinion.

OPINIONS BELOW

An unreported, nestled series of State of Michigan court opinions and orders are appealed from, as inventoried

below. These unpublished opinions and orders are reprinted in full, genuine copies as exhibits (as numbered below) in the seperate Appendix volume to this Petition.

EXHIBIT # 1 reprints the appealed from August 27, 1990 Michigan Supreme Court Order denying petitioner's timely motion for reconsideration of the Michigan Supreme Court's prior June 26, 1990 Order denying petitioner's delayed application for leave to appeal.

EXHIBIT # 2 reprints the Michigan Supreme Court's unpublished June 26, 1990 Order denying petitioner's delayed application for leave to appeal.

EXHIBIT # 3 reprints the October 16, 1989 Michigan Court Of Appeals panel's unpublished Order denying petitioner's timely motion for rehearing

of the initial August 4, 1989 panel's unpublished Memorandum Opinion.

EXHIBIT # 4 reprints the August 4, 1989 Michigan Court Of Appeals panel decision, which affirmed the State trial court's September 15, 1987 Opinion and September 28, 1987 Order Of Dismissal, albeit with a greater accentuation of the trial court's threshold lack of valid constitutionally required subject matter jurisdiction within the State of Michigan courts due to 17 USC 301(a) U.S. Copyright Act preemption bases of dismissal.

EXHIBIT # 5 reprints the initial September 28, 1987 State of Michigan Washtenaw County Circuit Court Order Of Dismissal based on the trial court's unpublished September 15, 1987 Opinion.

EXHIBIT # 6 reprints the State Of Michigan Washtenaw County Circuit Court unpublished Opinion of September 15, 1987, setting forth a dual, if not alternative, bases for the dismissal of the nine state law claims at issue in this appeal:

1) dismissal for lack of constitutionally requisite MCR 2.116(C)(4) subject matter jurisdiction due to 17 USC 301(a) U.S. Copyright Act preemption; and

2) a further MCR 2.116(C)(8) claim statement holding (albeit without normal MCR 2.116(I)(5) repleading opportunity due to the threshold 17 USC 301(a) preemption) in favor of Petitioner Cawley on seven (7) of nine (9) of the state claims on the relief theories actually pled (albeit the

state trial court ranged broadly, addressing fictitious claims conjured up by respondents, as opposed to pled by petitioner). Note: all State of Michigan trial level opinions are unpublished.

Additionally, EXHIBIT # 7 reprints the June 11, 1987 state trial court Oral Hearing Transcript at issue in the case, and EXHIBIT # 8 reprints the April 23, 1987 First Amended Complaint. Both documents are explicitly or implicitly referenced by the state trial judge in his September 15, 1987 Opinion and, thus, are essential to a proper understanding of the instant appealed from Michigan courts' unpublished opinions and orders.

COLLATERAL FEDERAL COURT OPINIONS

As Question 4 for review briefly raises under USSC Rule 14.1(a), since common citizen standards of just, efficient, economical litigation compel this pro per petitioner to at least NOTICE this Court of the fact, it bears notice that the disposition of the State of Michigan 87-032631-CK;104130; 87745 proceedings before this Court in this Petition is itself at issue as a defense basis under State of Michigan res judicata (claim preclusion and/or issue preclusion) doctrine in the following independent federal action:

--Cawley v. Swearer, et al., United States District Court, Eastern District Of Michigan, 87-70017-DT;

--on appeal upon completed briefs to the United States Court Of Appeals

for the Sixth Circuit, case number 90-1981.

The relation of this federal action 87-70017-DT;90-1981 to the instant proceeding is described in the "Statement Of The Case" section below. For now, but brief reprinting of the dispositive U.S. District Court June 19, 1990 Order adopting with modification a prior Magistrate's Report And Recommendations follows in full:

> Counts XXI, XXII, XXIII and XXIV are dismissed for lack of jurisdiction; Counts VII and XVI are dismissed for lack of jurisdiction; Counts I and X are dismissed for failure to state a cause of action and further as being barred by issue preclusion; Counts II, III, IV, V, VI, XI, XII, XIII, XIV and XV are dismissed on the basis of issue preclusion and/or res judicata; Counts VIII, XVII, IX, and XVIII are dismissed for failure to state a cause of action and/or issue preclusion; and Counts XIX and XX are dismissed as not involving any justiciable case or controversy.

JURISDICTION

As the "Opinions Below" section above itemizes, review here is sought of the Michigan Supreme Court's Order of August 27, 1990 denying timely motion for reconsideration of the Court's June 26, 1990 Order denying petitioner's delayed application for leave to appeal from the August 4, 1989 unpublished Memorandum Opinion of the Michigan Court Of Appeals panel affirming, albeit on somewhat modified bases, the original September 28, 1987 Order Of Dismissal entered by the Washtenaw County Circuit Court.

The jurisdiction of this Court to review the Michigan Supreme Court Order is invoked under 28 USC 1257(3).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED

This case centers on the U.S. Copyright Act, especially 17 USC 101, 102, 103, 106, 201, 301, 501, in light of the Berne Convention Implementation Act Of 1988. For the limited purposes of the Count 9 analysis, the Michigan Consumer Protection Act also figures. Pertinent sections are reprinted in full below.

17 USC 301 Preemption with respect to other laws

(a) On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that

date and whether published or unpublished, are governed exclusively by this title, Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.

(b) Nothing in this title annuls or limits any rights or remedies under the common law or statutes of any State with respect to--

(1) subject matter that does not come within the subject matter of copyright as specified by sections 102 and 103, including works of authorship not fixed in any tangible medium of expression; or

(2) any cause of action arising from undertakings commenced before January 1, 1978; or

(3) activities violating legal or equitable rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106.

(c) With respect to sound recordings fixed before February 15, 1972, any rights or remedies under the common law or statutes of any State shall not be annulled or limited by this title until February 15, 2047. The preemptive provisions of subsection (a) shall apply to any such rights and remedies pertaining to any cause of action arising from undertakings commenced on and after February 15, 2047. Notwithstanding the provisions of section 303, no sound recording fixed before February

15, 1972, shall be subject to copyright under this title before, on, or after February 15, 2047.

(d) Nothing in this title annuls or limits any rights or remedies under any other Federal statute.

(e) The scope of Federal preemption under this section is not affected by the adherence of the United States to the Berne Convention or the satisfaction of obligations of the United States thereunder.

17 USC 102 Subject matter of copyright: In general

(a) Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:

(1) literary works;
(2) musical works, including any accompanying words;
(3) dramatic works, including any accompanying music;
(4) pantomimes and choreographic works;
(5) pictorial, graphic, and sculptural works;
(6) motion pictures and other audiovisual works; and

(7) sound recordings.

(b) In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.

17 USC 103 Subject matter of copyright: Compilations and derivative works

(a) The subject matter of copyright as specified by section 102 includes compilations and derivative works, but protection for a work employing preexisting material in which copyright subsists does not extend to any part of the work in which such material has been used unlawfully.

(b) The copyright in a compilation or derivative work extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material. The copyright in such work is independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection in the preexisting material.

17 USC 106 Exclusive rights in copyrighted works

Subject to sections 107 through 118, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

(1) to reproduce the copyrighted work in copies or phonorecords;

(2) to prepare derivative works based upon the copyrighted work;

(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental lease, or lending;

(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; and

(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly.

17 USC 201 Ownership of copyright

(a) Initial Ownership.--Copyright in a work protected under this title vests

initially in the author or authors of the work. The authors of a joint work are coowners of copyright in the work.

(b) Works Made for Hire.--In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.

(c) Contributions to Collective Works.--Copyright in each seperate contribution to a collective work is distinct from copyright in the collective work as a whole, and vests initially in the author of the contribution. In the absence of an express transfer of the copyright or of any rights under it, the owner of copyright in the collective work is presumed to have acquired only the privilege of reproducing and distributing the contribution as part of that particular collective work, any revision of that collective work, and any later collective work in the same series.

(d) Transfer of Ownership.--

(1) The ownership of a copyright may be transferred in whole or in part by any means of conveyance or by operation of law, and may be bequeathed by will or pass as personal property by the applicable laws of intestate succession.

(2) Any of the exclusive rights

comprised in a copyright, including any subdivision of any of the rights specified by section 106, may be transferred as provided by clause (1) and owned separately. The owner of any particular exclusive right is entitled, to the extent of that right, to all of the protection and remedies accorded to the copyright owner by this title.

(e) Involuntary Transfer.--When an individual author's ownership of a copyright, or of any of the exclusive rights under a copyright, has not previously been transferred voluntarily by that individual author, no action by any governmental body or other official or organization purporting to seize, expropriate, transfer, or exercise rights of ownership with respect to the copyright, or any of the exclusive rights under a copyright, shall be given effect under this title, except as provided under title 11.

17 USC 501 Infringement of copyright

(a) Anyone who violates any of the exclusive rights of the copyright owner as provided by sections 106 through 118, or who imports copies or phonorecords into the United States in violation of section 602, is an infringer of the copyright.

(b) The legal or beneficial owner of an exclusive right under a copyright is entitled, subject to the requirements

of section 411, to institute an action for any infringement of that particular right committed while he or she is the owner of it. The court may require such ownership to serve written notice of the action with a copy of the complaint upon any person shown, by the records of the Copyright Office or otherwise, to have or claim an interest in the copyright, and shall require that such notice be served upon any person whose interest is likely to be affected by a decision in the case. The court may require the joinder, and shall permit the intervention, of any person having or claiming an interest in the copyright.

(17 USC 501(c-d-e) not pertinent)

17 USC 101 Selected Definitions

A "collective work" is a work, such as a periodical issue, anthology, or encyclopedia, in which a number of contributions, constituting seperate and independent works in themselves, are assembled into a collective whole.

A "compilation" is a work formed by the collection and assembling of pre-existing materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship. The term "compilation" includes collective works.

A "computer program" is a set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result.

"Copyright owner", with respect to any one of the exclusive rights comprised in a copyright, refers to the owner of that particular right.

A work is "created" when it is fixed in a copy or phonorecord for the first time; where a work is prepared over a period of time, the portion of it that has been fixed at any particular time constitutes the work as of that time, and where the work has been prepared in different versions, each version constitutes a seperate work.

A "derivative work" is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications, which, as a whole, represent an original work of authorship, is a "derivative work".

A work is "fixed" in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit

it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. A work consisting of sounds, images, or both, that are being transmitted, is "fixed" for purposes of this title if a fixation of the work is being made simultaneously with its transmission.

A "joint work" is a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.

A "work of the United States Government" is a work prepared by an officer or employee of the United States Government as part of that person's official duties.

A "work made for hire" is--

(1) a work prepared by an employee within the scope of his or her employment; or

(2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire. For the purpose of the foregoing sentence, a "supplementary work" is a work prepared for

publication as a secondary adjunct to a work by another author for the purpose of introducing, concluding, illustrating, explaining, revising, commenting upon, or assisting in the use of the other work, such as forewords, afterwords, pictorial illustrations, maps, charts, tables, editorial notes, musical arrangements, answer material for tests, bibliographies, appendixes, and indexes, and an "instructional text" is a literary, pictorial, or graphic work prepared for publication and with the purpose of use in systematic instructional activities.

BERNE CONVENTION IMPLEMENTATION ACT OF 1988, PL 100-568, HR 4262, October 31, 1988, 100th Congress, 2nd Session 102 Stat 2853, 2853-2854 (1988):

Section 3 Construction Of The Berne Convention,

(a) Relationship With Domestic Law.--The provisions of the Berne Convention--

(1) shall be given effect under title 17, as amended by this Act, and any other relevant provision of Federal or State law, including the common law; and

(2) shall not be enforceable in any action brought pursuant to the provisions of the Berne Convention itself.

(b) Certain Rights Not Affected.-- The provisions of the Berne Convention, the adherence of the United States thereto, and satisfaction of United States obligations thereunder, do not expand or reduce any right of an author of a work, whether claimed under Federal, State, or the common law--

(1) to claim authorship of the work; or

(2) to object to any distortion, mutilation, or other modification of, or other derogatory action in relation to, the work, that would prejudice the author's honor or reputation.

State Of Michigan Consumer Protection Act, MCLA 445.901 et seq;

MSA 19.418(1) et seq

--To the extent that this state statute is implicated, it is set forth in the text. Mere application is involved.

STATEMENT OF THE CASE

KEY FACTS In 1978-79 the US National Science Foundation (NSF), thru the Municipal Finance Officers Association (MFOA), sponsored a joint venture to create and market a 17 USC 201(c) symposium volume. Independent contractors were commissioned, among them Anton and Cawley. With NSF-MFOA consent, Anton and Cawley agreed to jointly author their commissioned copyright under UNITARY tenant 17 USC 201(a) ownership since scholarship trade rules (endorsed by 45 CFR 76, 689) require ALL co-authors to assume credit/blame for any joint product as ONE UNITARY TEAM so that the integrity and merit of such products be enhanced, thereby reversing normal 17 USC 201(a) tenants in common presumption. Additionally, it was agreed that the commissioned work be only employed within

the "commissioning" NSF-MFOA joint venture volume organized/edited by Miller, that prior to commissioned copyright creation or afterwards no similar in idea contents and/or format of expression work be released by the co-authors abscent NSF-MFOA written approval, that the commissioned copyright be included within the NSF-MFOA volume when it was "published" for market and carry the truthful authorship credit line "Thomas J. Anton, with The Assistance of Jerry P. Cawley", and that, among other aspects about the year plus production timetable, Cawley receive the above authorship credit in lieu of fee for services/expenses.

By 9-1980 unpublished copyright TXu 333-410 by Anton with Cawley (authorship credit line) was fully completed and accepted by NSF-MFOA as done. For NSF-MFOA, Miller received the work under joint ven-

ture organizer/editor trust duty of care, holding it till 10-1981 publication contract with Johns Hopkins University Press was signed by Miller for ALL commissioned contributors. Thereafter, working with one (1) "lead author" from each commissioned "team" (Anton in this case), Miller was supposed to oversee usual de minimis "editorial" changes for publication (in fact, only one other contribution of all the contributions underwent significant changes at this stage). Finally, after usual press delay, marketed cloth and paperback editions were to appear.

However, between 1980 and press time, an independent dispute arose over knowing release as true empirical data what in fact was false empirical data by Anton in work funded for $300,000.00 by Miller's NSF Office. Pursuant scholarship trade customs, NSF policies (45 CFR

76, 689), Cawley grieved since he was a co-author of the improper products. In retaliation the following events resulted.

INITIAL CONTRACT BASED WRONGS The present nine contract based claims arose in 1984-85 when Anton and Miller (and thru them the other ratifying defendants) did NOT perform the 1978-79 NSF-MFOA commissioning contract based duties owed to Cawley. Defendants concede the proofs, countering that 301(a) preemption saves them since they were "smart enough" to potentially infringe independent copyright and Lanham Act marketing federal rights of Cawley when breaching the contract and relational state rights at bar.

1ST SET OF PROOFS They say that, tho NSF-MFOA records, trade customs and in fact Cawley performance business records prove the breaches, they (1) NOT ONLY failed to include the 1980 Anton with

Cawley TXu 333-410 still unpublished copyright within the 1984 cloth (1985 paperback) Public Sector Performance Miller edited NSF-MFOA joint venture volume (thus, the NON-PERFORMANCE of the commissioning terms), (2) BUT IN ADDITION, they replaced the scheduled Anton with Cawley contribution with a 17 USC 103(a), 201(e) unauthorized under 17 USC 201(a) unitary tenant terms Anton listed as sole author derivative/de minimis version of TXu 333-410, which dropped all authorship/owner credits of Cawley. 17 USC 301(a) preemption of the state claims follows, they say, since publication is at issue and copyrights are implicated. FURTHER MARKETING WRONGS AND PROOFS In reply, Cawley argues the 1978-80 based instant contract based claims form a different transaction from the still con-

tinuing marketing harms from 1984-91, based on federal (15 USC 1125(a); 17 USC 501), not state, claims, involving different proofs and remedies, and by party agreement litigated in federal action 87-70017-DT;90-1981.

THE RECORD BELOW The APPENDIX VOLUME to this Petition reprints the below complaint, oral argument and court opinions.

TIME WHEN THE FEDERAL QUESTION FIRST AROSE IN THE STATE COURT PROCEEDINGS BELOW AND CIRCUMSTANCES

Upon agreement to repleading and defendant waiver of non-joinder of claims and abatement defenses coupled with refusal of removal to federal court, the defendants' pressed the 301(a) defense, with Brown University personal jurisdiction defense. Preemption followed.

REASONS FOR GRANTING THE WRIT

REASON # 1

--THE MICHIGAN STATE COURTS' HOLDING BELOW DECIDES (INCORRECTLY) WHAT ALL JUDGES, LAWYERS AND COMMENTATORS AGREE IS THE SINGLE MOST IMPORTANT FEDERAL QUESTION CONCERNING THE U.S. COPYRIGHT ACT STILL LEFT (LAMENTABLY) UNADDRESSED DIRECTLY BY THIS COURT; THE 17 USC 301 PREEMPTION TEST ISSUE.

Viewed narrowly by focusing solely on Copyright Law, a consensus exists within legal and scholarship circles that the clarification of the 17 USC 301 preemption test constitutes the foremost U.S. Copyright Act federal question still lamentably left unaddressed directly by this Court. As A. Latman, R. Gorman, J.C. Ginsberg, eds., Copyright For The Eighties, p. 595 (Va. 1985, 2d ed), put the matter:

> There is hardly a more significant (and probably no more troublesome) question underlying the Act than the preemptive effect of this provision. Basically, this question is: How much of the common law (or state statutory law), particularly that of unfair competition, is left standing or is permitted to develop by the new copyright law?

What accentuates the importance of this federal 17 USC 301 question, however, resides in the broader FEDERALISM interpretation of the 301 preemption test question. Briefly put, the U.S. Copyright (and related Patent and Trade Mark) law protections are but one part of a vastely larger complex of Intellectual Property Law which regulates the increasingly more central economic and governance presences of research based technologies within the United States of America and the world (i.e., via the Berne Convention Treaty). Just as these technologies are constantly

evolving, so too applicable federal-state (international) law regulating the technologies is always in an emergent state.

Consequently, a pressing public policy need exists for this Court to not only clarify the 301 preemption test per se, but to also do so in a way NOT overbroadly construing (as the lower courts did in this case) the scope of the 17 USC 301(a) preemptive effect to the UNJUST preclusion of other valid and necessary areas of state regulation addressing contract rights, relational interests (i.e., confidence, fiduciary, trust, access to trade secret research technology banks), and marketing rights which Congress did NOT intent to preempt under 17 USC 301(b)(1) or 17 USC 301(b)(3). This Court started this task in its well

received Kewanee Oil Co v, Bicron Corp, 416 US 470, 94 S Ct 1879, 40 L Ed 2d 315 (1974), and Aronson v, Quick Point Pencil Company, 440 US 257, 99 S Ct 1096, 59 L Ed 2d 296 (1979) holdings. But the job is a large and continuing one, meriting MORE ATTENTION ROUTINELY from this Court. For, as Latman et al., Copyright For The Eighties, op cit., p. 527, note:

> The intricacies of copyright ... should not obscure the fact that we have been dealing with a narrow area of law. We need not dwell on the seamlessness of law or the obvious interfacing of copyright with contracts, tax, federal procedure, etc. We should note, however, the frequency with which a claimed interference with rights related to intellectual property cannot be fully articulated in terms of an infringement of copyright. Among the variety of legal theories potentially applicable, several characteristically appear. .... Each of them is a field unto itself and is frequently explored in detail in advanced courses. (Emphasis added.)

The instant case shows the need for this Court to advance this job further.

REASON # 2

--ABSCENT A DIRECT RULING CLARIFYING THE 17 USC 301 PREEMPTION TEST BY THIS COURT, JUDICIAL CONFUSION, CONFLICTING INTERPRETATIONS AND AD HOC (IF NOT, AS HEREIN, UNJUST) DISPOSITIONS OF 17 USC 301 FEDERAL QUESTIONS WILL CONTINUE TO BEDEVIL FEDERAL AND STATE LITIGATION ACROSS THE NATION, NEEDLESSLY CHILLING 1ST AMENDMENT RIGHTS TO COURT ACCESS FOR MERITS DETERMINATION OF CLAIMS IN ACCORDANCE WITH APPROPRIATE COURT RULES BY VIRTUE OF (1) DISCOURAGING THE LIMITED SEGMENT OF THE "LOCAL BAR" TRULY EXPERT IN INTELLECTUAL PROPERTY LAW FROM ASSUMING REPRESENTATION DUTIES ON CONTINGENCY FEE BASES, (2) COERCING LITIGANTS TO DROP OTHERWISE PROPER CLAIMS FOR WANT OF LEGAL REPRESENTATION, OR (3) FORCING LITIGANTS TO ACT PRO PER IF THEY

LACK SUFFICIENT MONETARY RESOURCES TO HIRE TRULY EXPERT COUNSEL, BUT DO NOT WISH TO FORSAKE PROPER CLAIMS OR GET UNHAPPILY ASSOCIATED WITH THE FRINGE ELEMENT OF THE LOCAL BAR THAT, HAVING A LICENSE, WILL FOR SMALL FEE WILL TAKE ANY CASE, REGARDLESS OF THEIR TRUE SUBJECT MATTER COMPETENCY.

The second reason why a Writ ought to issue in this case concerns the absolutely fundamental 1st Amendment right to access the U.S. federal court system for merits determination of valid claims for relief in accordance with applicable court rules (Boddie v. Connecticut, 401 US 371, 91 S Ct 780, 28 L Ed 2d 113 (1971)). Tho a pro per petitioner out of financial necessity, at issue is MUCH MORE than "just" pro per access rights properly recognized by this Court (Haines

v. Kerner, 404 US 519, 520, 92 S Ct 594, 30 L Ed 2d 652, 654 (1972)).

At issue is whether a minimum level of generalist legal expertise in intellectual property law related subject matters currently exists across the USA to ROUTINELY allow fundamentally fair, merits resolution of valid claims in state or federal courts ABSCENT more piloting holdings from this Court? Petitioner pro per respectfully submits (1) such requisite subject matter expertise is lacking, and (2) remedial piloting opinions by this Court are sadly needed--indeed, begged for by lower level judges, lawyers, litigants and potential litigants (i.e., scholarship trade administrators and practitioners) alike.

REASON # 3

--CARDINAL FEDERAL INTERESTS IN MAINTAINING A CONTINUING CONSTRUCTIVE COMITY RELATIONSHIP BETWEEN FEDERAL AND STATE COURT SUBJECT MATTER DOMAINS AND ADJUDICATION PRACTICES ARE DIRECTLY AND DETRIMENTALLY LAID BARE BY THE MICHIGAN STATE COURTS' HOLDING BELOW, THEREBY RECOMMENDING A HOLDING BY THIS COURT IN ORDER TO PROPERLY UMPIRE THE CONTINUING WORKINGS OF THE UNITED STATES FEDERAL COURT SYSTEM.

The instant (improper) 301(a) holding below, coupled with its (improper) further usage in federal action 87-70017-DT;90-1981 as the basis for a claim/issue preclusion defense (open to multiple challenges) combine to illustrate the serious, significant COMITY PROBLEM to U.S. court system operations presented by 301.

Once when state versus copyright jurisdiction existed was the lead comity issue: Arthur Young & Co v. City Of Richmond, 895 F2d 967. 969 n 2 (4th 1990):

> The line between cases that "arise under" patent and copyright laws, as contemplated by 28 U.S.C. 1338(a), and those that present only state law contract issues, is "a very subtle one," C. Wright, A. Miller & E. Cooper, Federal Practice & Procedure 3582, at 307, and the question leads down "one of the darkest corridors of the law of federal courts and federal jurisdiction." Id. at 307 n. 11 (quoting Chisum, The Allocation of Jurisdiction Between State and Federal Courts in Patent Litigation, 46 Wash. L.Rev. 633 (1971)).

See T B Harms Co v. Eliscu, 339 F2d 823 (2d 1964), cert den, 381 US 915, 85 S Ct 1534, 14 L Ed2d 435 (1965); 3 Nimmer On Copyright 12.01(A).

NOW, 17 USC 301 compounds the 28 USC 1338(a) issue by making it the 17 USC 301(b)(1) FIRST PRONG of the 301 test, and ADDING the bedeviling 17 USC 301(b)(3) equivalency to 106 test.

REASON # 4

--THE MICHIGAN STATE COURTS' HOLDING IS INCONSISTENT WITH CONGRESS'S EXPRESS PURPOSE IN ENACTING THE U.S. COPYRIGHT STATUTE AND ITS KEYSTONE 17 USC 301 PREEMPTION TEST, IN LIGHT OF CONGRESS RECOGNIZED 9TH AND 10TH AMENDMENT RESERVED COMPLEMENTARY STATE LAW BASED RIGHTS AND OBLIGATIONS, AND U.S. TREATY OBLIGATIONS UNDER THE BERNE CONVENTION.

As also the case in CCNV v. Reid, 490 US ___, 109 S Ct 2166, 104 L Ed2d 811, 830 (1989), the holding below is inconsistent with and

> ... would impede Congress' paramount goal in revising the 1976 Act of enhancing predictability and certainty of copyright ownership. See HR Rep No. 94-1476, supra (sic: infra), at 129. In a "copyright marketplace," the parties negotiate with an expectation that one of them will own the copyright in the completed work. Dumas (v. Gommerman), 865 F2d (1093), at 1104-1105, n 18. With that expectation, the parties at the onset can

settle on relevant contractual terms, such as the price for the work and the ownership of reproduction rights.

The decision below so overly broadly stretches 17 USC 301(a) ambit at the improper expense of 17 USC 301(b)(1)(3) precluded from preemption state claims that the decision violates the 9th and 10th Amendments of the US Constitution. Preempted improperly are precisely the state law this Court notes the 1976 Act RELIES on to govern 17 USC 201 ownership rights and relational and marketing rights among parties.

REASON # 5

--THE MICHIGAN STATE COURTS' HOLDING IS "PLUM CONTRARY" TO A PROPER PLAIN LANGUAGE CONSTRUCTION OF THE 17 USC 301 PREEMPTION TEST AND EQUALLY CONTRARY TO THE PROPER PLAIN LANGUAGE CONSTRUCTION OF OTHER, COMPLEMENTARY PROVISIONS OF

THE COPYRIGHT ACT IMPLICATED WITHIN ANY PREEMPTION TEST--i.e., 17 USC 102, 103, 106, 201, 204, 205, 411, 501--AS INDICATED BY U.S. CONGRESSIONAL REPORTS.

A strict construction of 17 USC 301 preemption test is due (as indicated in CCNV v. Reid, 490 US ___, 109 S Ct 2166, 104 L Ed2d 811, 829 n 14 (1989)). Given the statute, the proper 301 test is set forth in Crow v. Wainwright, 720 F2d 1224, 1225-26 (11th 1983), cert den, 469 US 819, 105 S Ct 89, 83 L Ed2d 35 (1984):

> Section 301 in effect establishes a two-pronged test to be applied in preemption cases. We must decide whether the rights at issue fall within the "subject matter of copyright" set forth in sections 102 and 103 and whether the rights at issue are "equivalent to" the exclusive rights of section 106. Harper & Row, Publishers v. Nation Enters., 501 F.Supp. 848, 850 (S.D.N.Y. 1980). (Note omitted.)

This construction emphasizes equally 17 USC 301(b)(1) and 301(b)(3) exceptions to 17 USC 301(a) preemption.

Tho a subtle difference at first, the lower courts (like many published opinions) shortcircuited proper 301 test by assuming 301(b)(1) not applicable merely because a copyrignt was factually implicated in the claimed state rights. This error was then compounded by holding 301(b)(3) exceptions invalid since the contract rights at issue were preconditional to future exercise of 106 rights and, thus, equivalent. This improper 301 test leaves NO STATE LAW!

REASON # 6

--THE MICHIGAN STATE COURTS' HOLDING IS INCONSISTENT WITH EXISTENT COPYRIGHT ACT HOLDINGS BY THIS COURT, ESPECIALLY CCNV V. REID, 490 US ---, 109 S Ct ---, 104 L ED2d 811 (1989).

See also, Mills Music, Inc v. Snyder, 469 US 153, 105 S Ct 638, 83 L Ed2d 556.

REASON # 7

--THE MICHIGAN STATE COURTS' HOLDING CONFLICTS WITH REPORTED U.S. COURTS OF APPEAL OPINIONS ADDRESSING WHETHER THE COUNT 1 STATE CONTRACT LAW RIGHT CLAIMS ARE SUBJECT TO PREEMPTION UNDER THE 17 USC 301 U.S. COPYRIGHT ACT PROVISION.

The below 17 USC 301(a) Count 1 preemption holding (valid, if NOT proven state non-performance of contract claim was conceded) is not only contrary to the below Circuits, but 180 degrees contrary to the plain language of the U.S. Copyright Act itself: the Act deliberately RELIES upon complementary, collateral state contract based law to regulate the commissioning of copyrights, their ownership under 17 USC 201, their 17 USC 106 usages following creation, authorship credit lines affixed to them (left outside 17 USC 102, 103 Copyright Act

subject matter sweep and not equivalent to any 17 USC 106 statutory rights), any transfers of ownership, royality agreements, publication and marketing agreements, or covenant duties governing idea contents reported (in part) within copyrights, and party marketing relations.

Thus, Count 1 properly seeks state remedy for non-performance of contract obligation assuring joint, truthful authorship attribution credit line affixed to the NSF-MFOA commissioned jointly authored Anton with Cawley unpublished TXu 333-410 copyright upon its marketing release exclusively within the Miller 17 USC 201(c) joint venture volume. The claim follows these prior holdings:

--Granz v. Harris, 198 F2d 585, 588-589 (2d 1952);

--Stepdesign, Inc v. Research Media, Inc, 442 F Supp 32, 34 (SD NY 1977);

--Wolfe v. United Artists Corp, 583 F Supp 52, 54-57 (ED Pa 1983);

--Wolfe v. United Artists Corp, No. 80-6957, pp. 8-10(SD NY 7-21-83), aff'd without opin, 742 F2d 1439 (2d 1983);

--Locke v. Times Mirror Magazine, Inc, 25,750 1985 CLD 19,368, 19,370-71 (SD NY 1985).

Since the right to truthful authorship credit line attribution is a mark right, both outside 17 USC 102, 103 subject matter under 17 USC 301(b)(1), and NOT equivalent to 106 rights via 301(b)(3), 17 USC 301(a) preemption is NOT proper! US CONGRESS Congress has indicated this NON-preempted status at least thrice. First, as drafted, the Copyright Act in fact relies on complementary, collateral state legal instrumentalities to exercise copyright ownership rights, subject to the Act, including recordation provisions of certain state contract agreements. Thus, as since Carter v. Bailey,

64 Me 458, 463 (SC Maine 1874) at least, joint authors may exercise 17 USC 201(a) ownership rights either as tenants in common (the presumed form) or as unitary tenants (the presumed form in many foreign counties under the Berne Convention; 3 Nimmer On Copyright, 17.07(B), 1987 ed); HR Rep No 1476, 94th Cong, 2d Sess, 1, 120-121, 5 US Code Cong & Ad News, 5659, 5736 (1976). Second, the right to truthful authorship credit line attribution affixed to any copyright is NOT governed by the Copyright Act. Congress stressed this fact in the Berne Convention Implementation Act Of 1988, Sec. 3, 4, 6, 102 Stat 2853 (1988). Sen Rep No 100-352, 1, 9-10, 6 US Code Cong & Ad News, 3706, 3714-3716 (1988). Third, among NON-preempted state protections, Congress expanded 15 USC 1125 federal unfair trade practice marketing

rights in PL 100-667, 102 Stat 3935, to augment traditional state law remedies.

Hence, Congress meant it when it said of the 17 USC 301(a) provision,

> Nothing in the bill derogates from the rights of parties to contract with each other and to sue for breaches of contract;....
> (HR Rep No 1476, 1, 132, 5 US Code Cong & Ad News, 5659, 5748 (1976))

DC CIRCUIT In CCNV v. Reid, 846 F2d 1485, 1498-99 (DC Cir 1988), aff'd on 17 USC 101, 201(b) grounds, 490 US ___, 109 S Ct 2166, 104 L Ed2d 811 (1989), the DC Circuit implicitly recognized commission contract terms NOT preempted, and further noted that truthful authorship attribution credit line rights are protectable under 15 USC 1125(a) or any Berne Convention compatible non-marketing state rights, such as contract terms, tho no such contract terms existed in CCNV v. Reid factual circumstances. In

accord: Peckarsky v. ABC, Inc, 603 F Supp 688, 692-93, 695-96 (D DC 1984) (contract terms not preempted).

4TH CIRCUIT In Acorn Structures, Inc v. Swantz, 657 F Supp 70, 26,116 1987 CLD 21,109 (WD Va Char Div 1987), rev'd, __ F2d ___, 26,251 1988 CLD 21,739-4, at 21,739-4 (4th 1988), the 4th Circuit reversed per curiam a lower court preemption of a contract claim, noting:

> Plaintiff's claim for breach of contract entails a distinct cause of action which is clearly not within the subject matter of copyright but arises out of the implicit contractual provisions of the design agreement. Swantz was not committed to purchase a house package from Acorn. However, Acorn prepared the plans for Swantz, only "as a prospective customer of an Acorn house package." Implicit in the contract between Acorn and Swantz was an agreement that while Swantz did not have to use Acorn's plans, if he did use Acorn's plan then he was obligated either to purchase the plans from Acorn or to purchase his building materials from Acorn. This agreement is clearly implied by the contract. Acorn's cause of action is based upon this implicit

> provision of the contract which does not arise out of the subject matter of copyright and is therefore a separate and distinct cause of action.
>
> Accordingly, we hold that the district court erred in its judgment that plaintiff's claim for breach of contract is preempted by federal copyright law.

In accord: Arthur Young & Co v. City Of Richmond, 895 F2d 967, 971 (4th 1990), holding contract claim seperate and preconditional to copyright claim.

5TH CIRCUIT More on 17 USC 301(b)(3), than 17 USC 301(b)(1), grounds, the 5th Circuit also held preemption of contract claims IMproper in Taquino v. Teledyne Monarch Rubber, 893 F2d 1488, 1490 adopting the appended District Court opinion which notes at 1501 (5th 1990):

> As noted below, this court finds that Taquino breached the contract. Having done so, he cannot claim the benefits of it to afford himself commissions coming due following his breach.
>
> The contract forbade Taguino from representing a competing company prior

to termination. This is a valid provision. By designing and seeking to patent and build his own competing device, and by taking steps to have his company added to the approved vendor list of Tenneco. TMR's best customer, Taquino did breach his contract. See, e.g., Dufau. supra (sic: Dufau v. Creole Engineering, Inc., 465 So2d 752 (La App 1985)).

Further, Taquino used TMR drawings in his sales materials. The contract properly prohibited this. The right to claim this breach of contract is not preempted by the copyright laws. Universal Gym Equipment, Inc v. Atlantic Health & Fitness Products, 229 U.S.P.Q. 535 (D.Md.1985). 17 USC 301 only preempts rights equivalent to the exclusive rights within the general scope of the copyright law. A right is equivalent if the mere act of reproduction, distribution, or display infringes it. 17 USC 106; Allied Artists Pictures Corp v. Rhodes, 496 F Supp 408 (SD Ohio 1980), aff'd, 679 F2d 656 (6th Cir 1982); Harper & Row Publishers, Inc v. Nation Enterprises, 723 F2d 195 (2nd 1983). This action for breach of contract involves an element in addition to mere reproduction, distribution, or display: the contract promise made by Taquino, therefore, it is not preempted. Smith v. Weinstein, 578 F Supp 1297 (SD NY 1984), aff'd, 738 F2d 419 (2nd 1984); Nimmer, Nimmer on Copyright, 16.04(C)(1985).

In accord: Zim v. Western Publishing Co,

573 F2d 1318 (5th 1978), wherein no preemption defense was even raised.

9TH CIRCUIT Tho not ruling directly on the contract term preemption issue evidently, implicitly the 9th Circuit has indicated preemption is IMproper thru at least the below series of holdings: Oddo v. Ries, 743 F2d 630, 634 (9th 1984)(license contract valid); Topolos v. Caldeway, 698 F2d 991, 994-95 (9th 1983)(preconditional contract and copyright claims distinct and complementary, as held below in); Effects Associates, Inc v. Cohen, 817 F2d 72, 73 (9th 1987); 908 F2d 555, 557-58 (9th 1990); Dumas v. Gommerman, 865 F2d 1093 (9th 1989); Hal Roach Studio v. Richard Feiner & Co, 896 F2d 1542, 1554 (9th 1990).

2ND CIRCUIT Thru affirmations without opinions and implicitly, the 2nd Circuit has indicated contract terms are NOT sub-

ject to valid preemption: Wolfe v. United Artists Corp, op cit; Locke v. Times Mirror Magazine, Inc, op cit; Gilliam v. ABC, 538 F2d 14, 19-24 (2d 1976)(license valid); Smith v. Weinstein, 578 F Supp 1297, 1307 (SD NY 1984), aff'd without opin, 738 F2d 419 (2d 1984); Whitfield v. Lear, 582 F Supp 1186, 1189 (ED NY 1984), rev'd and rem'd on other grounds, 751 F2d 90 (2d 1984)(implied in fact contract NOT preempted); Custom Import Inc v. Hanmee Trading Co, Inc, 596 F Supp 1126 (SD NY 1984)(implicitly not preempted); Angel Music, Inc v. ABC Sports, Inc, 25,923 1986 CLD 20,227, 20,232 (SD NY 1986)(license); Kelley v. April Music, 26,237 1988 CLD 21,693, 21,694-95 (SD NY 1988)(royalty contract); Ronald Litoff, Ltd v. American Exp Co, 621 F Supp 981, 986 (SD NY 1985)(joint venture contract); Salinger v. Random

House, Inc, 811 F2d 90, 100 (2d 1987), cert den, ___ US ___, 108 S Ct 213, 98 L Ed2d 177 (1987)(third party library access contract implicitly valid).

Even the 2d Circuit holding the lower courts relied upon supports the Petitioner, Harper & Row, Publishers v. Nation Enterprises, 501 F Supp 848 (SD NY 1980), aff'd, 723 F2d 195 (2d 1983), rev'd and rem'd on other grounds, 471 US 539, 105 S Ct 2218, 85 L Ed2d 588 (1985), once divergent Harper & Row case facts are properly distinguished as follows:

1) underlying Ford-Harper & Row-Time contracts were held valid, as herein;
2) 301(a) preemption only applied to Nation's usage of the illictly secured manuscript since NO RELATIONAL OBLIGATIONS bound Nation with Ford et al; here by contract the parties are bound as joint ventures.

7TH CIRCUIT In WGN Continental Broad Co v. United Video, 693 F2d 622 (7th 1982) the 7th Circuit implicitly held contracts not subject to preemption. See also, Baltimore Orioles v. Major League Baseball Players, 805 F2d 663 (7th 1986), cert den, ___US ___, 107 S Ct 1593, ___ L Ed2d ___ (1987).

11TH CIRCUIT In Trust Co Bank v. MGM/UA Enter Co, 772 F2d 740 (11th 1985) and MGB Homes, Inc v. Ameron Homes, Inc, 903 F2d 1486 (11th 1990), the 11th Circuit implicitly held contracts not subject to valid preemption.

OTHER CIRCUITS Other implicit Circuits' NON-preemption of contract holdings could be cited, just as 301(a) holdings ALL NOT involving relational party ties (i.e., Ehat v. Tanner, 780 F2d 876 (10th 1985)) or contracts could be distinguished. State contracts are NOT preempted!

REASON # 8

--THE MICHIGAN STATE COURTS' HOLDING CONFLICTS WITH REPORTED U.S. COURTS OF APPEAL OPINIONS ADDRESSING WHETHER THE COUNT 2 STATE COMMISSIONING OF THE CREATION OF A COPYRIGHT FOR EXCLUSIVE PUBLICATION INCLUSION WITHIN A SPECIFIC COLLECTIVE WORK CONTRACT LAW RIGHT CLAIMS ARE SUBJECT TO PREEMPTION UNDER THE 17 USC 301 U.S. COPYRIGHT ACT PROVISION.

Count 2 states a simple non-performance of publication/marketing state contract agreement, following Zim v. Western Publishing Co, 573 F2d 1318 (5th 1978); Random House, Inc v. Gold, 464 F Supp 1306 (SD NY 1979), aff'd without opin, 607 F2d 998 (2d 1979). The lower courts, upon largely conceded proofs, held the claim valid, but pre-

empted under 17 USC 301(a) since the right to publish a copyright was one of the ennumerated 17 USC 106 rights.

This view misunderstands the Act's requirement of 17 USC 201 ownership as precondition of exercise of 106 rights via state contract agreements not subject to preemption. Authorization to validly exercise 106 rights is at issue, with defendants NOT PERFORMING a promised commissioning contract obligation. Thus, for all the reasons noted in the preceding "Reason # 7" section on Count 1, preemption is NOT proper.

This claim does not involve the exceeding of contract terms in violation of 106 rights UPON COMPLETE FULFILLMENT of prior, non-preempted contract terms, as in Burnett v. Warner Bros Pictures, 25,761 1985 CLD 19,417, 19,419 (NY Sup Ct, NY Cnty, Pt 1, Spec Term 1985).

REASON # 9

--THE MICHIGAN STATE COURTS' HOLDING CONFLICTS WITH REPORTED U.S. COURTS OF APPEAL OPINIONS ADDRESSING WHETHER THE COUNT 3 CONTRACT DERIVED STATE COVENANT DUTY NOT TO COMPETE CLAIMS ARE SUBJECT TO PREEMPTION UNDER THE 17 USC 301 U.S. COPYRIGHT ACT PROVISION.

Count 3 is a claim for breach of a state covenant duty not to compete with the Miller organized NSF-MFOA joint venture symposium volume creation project. The lower courts found the contract based claim valid, but preempted since, at defendants wish (pursuant standard scholarship trade customs) the joint venture contract terms included this legal duty to NOT market any work akin in IDEA CONTENTS or format of expression to the exclusively commissioned joint venture collective work contributions. This duty

governed party relational interests before the time of copyright fixation as to format of expression, and always as to IDEA CONTENTS similarities NOT regulated by Copyright under 17 USC 102(b). Bromhall v. Rorvik, 478 F Supp 361, 367 (ED PA 1979); Nash v. CBS, Inc, 899 F2d 1537 (7th 1990)(no copyright remedy).

Like Count 1, Count 3 is a contract based claim, not subject to preemption. Taquino v. Teledyne Monarch Rubber, 893 F2d 1488, 1490, 1497-98 (5th 1990), as quoted above at p. 36 ; Fantastic Fakes, Inc v. Pickwick Interm, Inc, 661 F2d 479, 483-484 (5th, Unit B 1981); Balboa Ins Co v. Trans Global Equities, 267 Cal Rptr 787, 795 (CA CALIF 3RD DIST 1990).

The below improper preemption of this claim would negate the purpose of joint venture originating agreements.

REASON # 10

--THE MICHIGAN STATE COURTS' HOLDING CONFLICTS WITH REPORTED U.S. COURTS OF APPEAL OPINIONS ADDRESSING WHETHER THE COUNT 4 NEGLIGENT PERFORMANCE OF STATE CONTRACT ASSUMED DUTIES CLAIMS ARE SUBJECT TO PREEMPTION UNDER THE 17 USC 301 U.S. COPYRIGHT ACT PROVISION.

Count 4 states an alternative claim for relief to the Counts 1 and 2 contract claims. At issue is joint venture organizer/editor Miller's negligent performance of her contract derived, fiduciary level of care duty to Cawley to see that mere mistake/confusion on Johns Hopkins University Press's part did NOT "breach" the commissioning contracts, as happened herein, by leaving out Cawley's due junior co-author credit line attribution from the final published editions, in

contrast with 1980 completed TXu 333-410 unpublished manuscript entrusted to Miller's care. The lower courts agreed this duty was in fact violated if a fiduciary relationship existed, but they refused to recognize one and found the claim otherwise preempted as in Counts 1 thru 3.

The "negligence" at issue arises outside (17 USC 301(b)(1)) and beyond (17 USC 301(b)(3)) Copyright Act subject matter jurisdiction. Further, fiduciary obligations inhere in the Miller joint venture arrangements placing in her care (TRUST) post-creation publication efforts. Like fiduciary claims generally, Count 4 is NOT preempted. Balboa Ins Co v. Trans Global Equities, op cit, 267 Cal Rptr 787, 802-803 (1990)(collecting case citations and CORRECTING 9th Circuit California law interpretation somewhat).

REASON # 11

--THE MICHIGAN STATE COURTS' HOLDING CONFLICTS WITH REPORTED U.S. COURTS OF APPEAL OPINIONS ADDRESSING WHETHER THE COUNT 5 STATE LAW QUANTUM MERIUT CLAIMS FOR SERVICES RENDERED AND EXPENSES ACCRUED RECOVERY ARE SUBJECT TO PRE-EMPTION UNDER THE 17 USC 301 U.S. COPYRIGHT ACT PROVISION.

Count 5 recognizes that Cawley exchanged (a) payment for services rendered and expenses incurred for (b) the co-authorship credit line attribution at issue in Counts 1-2 since he was working on another federal grant contract at the time of creation herein. Thus, based on his performance of the commissioning terms, but defendants' breaches, he claims due pay and expenses. The lower courts found this alternative relief

valid, but preempted.

As held in Schuchart & Assoc v. Solo Serve Corp, 540 F Supp 928, 945 (WD TX SA Div 1982); Brignoli v. Balch Hardy And Scheinman, Inc, 645 F Supp 1201, 1205 (SD NY 1986), such a claim arises in contract outside Copyright Act regulation and involves labor-expense commissioning agreement extra-elements. It is NOT subject to preemption. Further, relational obligations among co-author/ co-owners are at issue and such rights (of all precise kinds) are left to state law under the Copyright Act (Korman v. Iglesias, 736 F Supp 261, 265 (SD Fla 1990), citing CCNV v. Reid, op cit, 846 F2d 1485, 1498; Weissmann v. Freeman, 868 F2d 1313, 1317-18 (2d Cir), cert den, ___US ___, 110 S Ct 219, 107 L Ed2d 172 (1989); Oddo v. Ries, 743 F2d 630, 633 (9th 1984)).

REASON # 12

--THE MICHIGAN STATE COURTS' HOLDING CONFLICTS WITH REPORTED U.S. COURTS OF APPEAL OPINIONS ADDRESSING WHETHER THE COUNT 6 STATE LAW CLAIMS FOR THIRD PARTY ULTRA VIRES ACTING JOINT VENTURER TORTIOUS INTERFERENCE WITH IN PLACE CONTRACT/BUSINESS ADVANTAGES ARE SUBJECT TO PREEMPTION UNDER THE 17 USC 301 U.S. COPYRIGHT ACT PROVISION.

Count 6 seeks relief for Anton's tortious interference with the in place Cawley-Miller joint venture commissioning contract promises based on Michigan law in Stack v. Marcum, 147 Mich App 756, 759-760, 382 NW2d 743 (1985). At issue is is NOT JUST Anton's failure to perform the Count 1 contract obligation, but his FURTHER intentional procuring of Miller's non-performance of the Count 2 contract

duty owed Cawley and the Count 3 further duty not to compete with the Miller lead NSF-MFOA joint venture commissioning terms and arrangements among parties. The lower courts found Count 6 valid, but preempted since incidental to the admitted breach was a further potential infringement of Cawley's copyright act rights which excused the tortious conduct of Anton that was also contrary to fiduciary duties of care Anton owed to Cawley, Miller and other joint venturers.

Preemption is NOT proper since relational legal obligations among contract bound joint venturers is at bar. Copyright does NOT govern such matters. For somewhat analogous holdings precluding preemption, see Uncle Jam Records v. Warner Bros, 25,580 1983 CLD 18,428, 18,430 (SD NY 1983); H_2O Swimwear v. Lomas, 560 NYS2d 19, 20-22 (SC NY APP DIV 1ST 1990).

REASON # 13

--THE MICHIGAN STATE COURTS' HOLDING CONFLICTS WITH REPORTED U.S. COURTS OF APPEAL OPINIONS ADDRESSING WHETHER THE COUNT 7 STATE LAW TRESPASS TO SCHOLARSHIP TRADE CONFIDENTIAL RESEARCH BANKS "TRADE SECRETS" CLAIMS ARE SUBJECT TO PREEMPTION UNDER THE 17 USC 301 COPYRIGHT ACT PROVISION.

Counts 7 and 8 address, alternatively, a central scholarship trade regulatory issue not settled at law yet. All scientific research is like an ICE-BERG, with discrete publications comprising the "TIP" of the Ice-Berg and being covered, as the case may be, by copyright, other marketing law, contract or relational laws. However, submerged is the keystone scholarship trade commodity--empirical "RESEARCH BANKS"--and a more central trade regulatory issue--"ACCESS" to the

substantive idea contents and empirical supporting documentation within the "research banks".

Painstakingly put together thru the years, each scholar's unique "research bank" portfolio provides a "base area" from which to issue a series of discrete works establishing the scholar's mark as an expert in a field and, thus, leading to job and grant opportunities. The better a scholar's "research bank", the better the likely scholarship. The contents vary by field/method, but in idea value are akin to "trade secrets" and are always kept "private" or "confidential" since they represent a scholar's in-progress "life's trade work". Part of the contents are copyrights per se, but most of the files are working ideas, facts, bibliographies, or West Law-like literature summary "keynotes".

Trade secret or confidentiality law may shield "research banks", but the key trade issue remains "ACCESS" since over the years scholars will give limited purpose licenses to access a bank in return for similar access or as part of a one-time co-authorship effort. Thus, limited license access permits may be many and extend thru time, so as to make the "reverse engineering" intellect of the trade secrets knowable, and the confidentiality of the varied idea contents guessable. Yet, within the scholarship trade, priority remains with the "research bank" creator, and all other scholars owe affirmative duty to credit the creator for access, as licensed, to the contents.

Absent this cardinal trade governance device, cumulative knowledge advancement would be disasterously derailed since (1) open trade communication would

be precluded by (2) legally allowed theft of years in the making work. It would no longer pay to do the research.

Given the above trade principles, in Count 7 Cawley claims that Anton by NOT performing the Counts 1-3 contract duties forfeited his "limited license" to access Cawley's "research bank" for joint venture purposes, and thereby trespassed upon Cawley's dominion to control access rights when he relied upon materials publically subsequently instead of adhering to trade cannons and refraining from relying upon Cawley's materials, knowledge of which derives from Cawley, not reverse engineering or the marketplace of free ideas. As in Gladstone v. Hillet, 26,336 1988 CLD 22,157, 22,162-63 (CA CALIF 1ST DIST 1988), Anton NOT ONLY violated the initial access agree-

ment, but FURTHER violated independent Restatement (2d) Of Torts, Sec. 321-322 legal duties to cease illicit accessing, and aid Cawley by holding to the initial access terms, crediting his work, and returning 17 USC 202 copies of Cawley's physical materials to him.

The lower courts found Count 7 a valid, but preempted claim. The trial court never understood the scholarship trade rationale, however; hence, the very ranging dictum, abscent discovery chance.

Like trade secret or confidentiality breach claims (Balboa Ins Co v. Trans Global Equities, op cit, 267 Cal Rptr 787, 797-803 (1990)(citing the lead cases)), this illicit "access" trespass claim arises from relational party joint venture rights outside and beyond Copyright scope under 17 USC 301(b)(1)(3). This claim is the kind of progeny of

International News Service v. Associated Press, 248 US 215, 39 S Ct 68, 63 L Ed2d 211 (1918) that Congress expressly exempted from valid preemption in HR Rep No 1476, op cit, 1, 132-33, 5 US Code Cong & Ad News, 5659, 5748 (1976).

REASON # 14

--THE MICHIGAN STATE COURTS' HOLDING CONFLICTS WITH REPORTED U.S. COURTS OF APPEAL OPINIONS ADDRESSING WHETHER THE COUNT 8 STATE LAW CONVERSION OF SCHOLARSHIP TRADE CONFIDENTIAL RESEARCH BANKS "TRADE SECRETS" CLAIMS ARE SUBJECT TO PREEMPTION UNDER THE 17 USC 301 U.S. COPYRIGHT ACT PROVISION.

Count 8 reiterates Count 7 under a conversion claim that the lower courts found preempted; the trial court initially held no claim. Given dispossession, the claim is valid and not preempted.

REASON # 15

--THE MICHIGAN STATE COURTS' HOLDING CONFLICTS WITH REPORTED U.S. COURTS OF APPEAL OPINIONS ADDRESSING WHETHER THE COUNT 9 STATE CONSUMER PROTECTION ACT STATUTORY KIND OF CLAIM IS SUBJECT TO PREEMPTION UNDER THE 17 USC 301 U.S. COPYRIGHT ACT PROVISION.

Count 9 seeks to secure Michigan Consumer Protection Act, MCLA 445.901 et seq;MSA 19.418(1) et seq. injunctive CONSUMER STANDING TO SUE relief. It enforces general U.S. scholarship trade, U.S. Government (45 CFR 76, 689), U.S. National Academy of Sciences (On Becoming a Scientist, 14-21 (1989)) endorsed MINIMUM scholarship trade practice marketing standards, prohibiting marketing knowingly or negligently of false empirical data as tho true or affixation of false authorship credit lines to any

trade products. In contrast with 15 USC 1125(a) federal law requiring competitor, NOT consumer, standing and, thus, protecting different rights/interests, the state law happily allows any scholar to secure remedial injunction to protect their own trade practitioner consumer interests. The lower courts held Count 9 valid on the theory pled, but preempted, abscent comprehension of the significant scholarship interest at bar.

Preemption is improper since the statute prohibits misrepresentation or other deceptive trade practices outside and beyond Copyright Act scope under 17 USC 301(b)(1) and (3). Allied Artists Picture Corp v. Rhodes, 496 F Supp 408 (SD OHIO ED 1980), aff'd 679 F2d 656 (6th 1982); Associated Film Dist Corp v. Thornburgh, 683 F2d 808 (3rd 1982); Ballas Buick-GMC v. Taylor Buick, 25,550

1983 CLD 18,239, 18,240 (C Pl Ct Lucas Cnty Ohio 1981); Garrido v. Burger King Corp, 558 So2d 79, 83 (CA FLA 3rd 1990); Donald Frederick Evans v. Continental Homes, Inc, 758 F2d 897, 914 (11th 1986); Taquino v. Teledyne Monarch Rubber, op cit, 893 F2d 1488, 1490, 1499 (5th 1990); Valente-Kritzen Video v. Pickney, 881 F2d 772, 776 (9th 1989).

REASON # 16

--THE MICHIGAN STATE COURTS' HOLDING CONFLICTS WITH REPORTED STATE COURT HOLDINGS APPLYING THE 17 USC 301 U.S. COPYRIGHT ACT PREEMPTION TEST, INCLUDING AT LEAST IMPLICITLY THE ONLY REPORTED STATE OF MICHIGAN CASE THAT PETITIONER PRO PER IS AWARE OF.

Too many state holdings favoring Petitioner exist to even list here. The "lead" state holdings, however, follow.

MICHIGAN Field Enterprises v. Dept of Treasury, ___ Mich App ___, 457 NW2d 113 (CA Mich 1990) recognizes licenses as NOT preempted under Copyright implicitly.

CALIFORNIA Perhaps the single best state holding, Balboa Ins Co v. Trans Global Equities, op cit, 267 Cal Rptr 787 (CA 3rd 1990) noting state contract, relational, and various marketing claims, generally termed unfair trade practices claims, are NOT preempted, citing cases, and qualifying Del Madera Properties v. Rhodes And Gardner, Inc, 820 F2d 973 (9th 1987). Worth v. Worth, 195 Cal App 3rd 768, 26,208 1988 CLD 21,524, 21,528 (CA CALIF 1ST 1987) holds community property laws not subject to preemption.

WISCONSIN M Bryce & Assoc, Inc v. Gladstone, 107 Wisc2d 241, 319 NW2d 907, 916-919 (CA WISC 1982), cert den, 459 US 944, 103 S Ct 258, 74 L Ed2d 201 (1982) holds

trade secrets law NOT preempted by U.S. Copyright law.

NEW YORK H_2O Swimwear, Ltd v. Lomas, 560 NYS2d 19 (SC NY APP DIV 1ST 1990) is a fair summary of New York law on a range of relational/marketing claims NOT subject to preemption.

FLORIDA Garrido v. Burger King Corp, 558 So2d 79 (CA FLA 3RD 1990) summarizes state law NON-preempted claims. See also, Van Dusen v. Southeast First National Bank Of Miami, 25,853 1985 CLD 19,890, 19,896-19,899 (CA FLA, 1985).

REASON # 17

--MINIMUMLY, THIS COURT OUGHT TO EXERCISE ITS SUPERVISORY POWERS TO REMEDIALLY CORRECT THE PLAIN FACTUAL AND LEGAL ERRORS REGARDING THE U.S. COPYRIGHT ACT 17 USC 301 PREEMPTION TEST MANIFEST IN THE MICHIGAN STATE COURTS' HOLDING

BELOW, AS ENNUMERATED BRIEFLY WITHIN.

A proper, narrow bases for remedial reversal rests on the below "facts".

1) A plainly false, sua sponte trial court FABRICATED fact lies at the core of the lower courts' misconstruction of the 9 state claims: the finding that in 1980 the University of Michigan Press published as a BOOK the still unpublished Anton with Cawley TXu 333-410 copyright, with proper junior co-authorship credit line given Petitioner Cawley. THIS IS FALSE. Remove this fictitious premise (Appendix, 9-15-87 Opinion, at 1-5, 14;A-17-27, 48) and the whole logic of the lower courts' 301(a) disposition fails, and non-preemption is clear.

2) Beyond the improper 301(a) holding noted in Reasons 1-16, tainted 7-2 claim statement secondary holding issued below via wrong usage of other Act provisions.

CONCLUSION

For the foregoing 17 reasons, the Petitioner pro per respectfully prays that a Writ Of Certiorari issue in this case.

A PRO PER'S RELIEF REQUEST

Since this is a pro per petition and all litigation costs scarce resources of time, expertise and money, and this Court always possesses more issues meriting resolution than its docket allows, the pro per Petitioner respectfully further notes two (2) points.

POINT # 1: A Writ ought to issue in this case, accompanied by a per curiam reversal on the nine 17 USC 301(a) preemption holdings, with all other matters being vacated and remanded to the Michigan state courts for reconsideration in light of the 301(a) rever-

sal. The present petition papers, plus the "matured" appellate papers of the parties (which contain specific record references) in the record below (which this Court can call up) ought to permit just, economical, efficient resolution of this appeal.

POINT # 2: Expressly reserving any and all appellate rights in independent federal action 87-70017-DT;90-1981, now before the 6th Circuit Court of Appeals on completed briefing, Petitioner pro per trusts to this Court's discretion whether it wishes to simultaneously resolve the two cases since this case is one basis for the other decision.

Respectfully submitted,

SIGNATURE: Jerry P Cawley 11-23-90

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90-831

FILED
NOV 26 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE SUPREME COURT OF

THE UNITED STATES

October Term, 1990

JERRY P. CAWLEY, Petitioner

-vs-

STEVEN MULLER, et al.,

Respondents

APPENDIX VOLUME:

PETITION FOR WRIT OF CERTIORARI

To the Michigan Supreme Court

Submitted By: Jerry P. Cawley
Pro Per
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Home # (313) 481-1596
Office # (313) 434-8508,
24-hour messages

APPENDIX PAGE: A-i

Jerry P. Cawley, the Petitioner pro per, hereby certifies that the appended Exhibits, listed below, are true, genuine, full copies of the original documents found in the instant case record as exhibits. Pursuant USSC Rule 14.1(k), these Exhibits are being presented via this seperate volume.

Signed: Jerry P Cawley 11-23-90

Petitioner, pro per Date

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LISTING OF APPENDICIES

Item — Page

1. Memorandum ORDER of the Michigan Supreme Court in this case, issued August 27, 1990, denying a motion for reconsideration and starting the time for this appeal. A-1
2. Memorandum ORDER of the Michigan Supreme Court in this case, issued June 26, 1990, denying delayed application leave to appeal.. A-3
3. Memorandum ORDER of the Michigan Court Of Appeals in this case, issued October 16, 1989, denying timely

LISTING OF APPENDICES

Item — Page

motion for rehearing. A-5

4. Unpublished Memorandum OPINION of the Michigan Court Of Appeals panel in this case, issued August 4, 1989, affirming the trial court dismissal, with added emphasis on the 17 USC 301(a) U.S. Copyright preemption dismissal basis. A-7

5. ORDER OF DISMISSAL entered by the State of Michigan Circuit Court trial court in this case, entered September 28, 1987, dismissing the nine state claims pursuant the Exhibit # 6 September 15, 1987 Opinion. A-10

LISTING OF APPENDICES

Item — Page

6. OPINION of the State of Michigan Circuit Court trial court in this case, issued September 15, 1987.. A-14

7. ORAL HEARING TRANSCRIPT of the Thursday, June 11, 1987 hearing in this case before the State of Michigan Circuit Court trial court. A-63

8. April 23, 1987 FIRST AMENDED COMPLAINT in this case, whose nine state law claims as pled are at issue in this appeal. A-87

EXHIBIT # 1

Memorandum ORDER of the Michigan Supreme Court, issued August 27, 1990, denying a timely June 26, 1990 motion for reconsideration, in Jerry P. Cawley v. President Of Johns Hopkins University, and Johns Hopkins University Press; President Of Brown University, The Board Of Regents, The University Of Michigan, State Of Michigan Supreme Court Action # 87745 (# 104130 in the Michigan Court Of Appeals; action # 87-032631-CK in Circuit Court)

Note: The caption erroneously leaves out the two lead individual defendants: Thomas J. Anton, and Trudi C. Miller.

--The text of the ORDER follows below:

On order of the Court, the motion for reconsideration of this Court's order of June 26, 1990 is considered, and it is DENIED, because it does not appear that the order was entered erroneously.

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of Court.

August 27, 1990

Jacqueline B. MacKinnon

Deputy Clerk

EXHIBIT # 2

Memorandum ORDER of the Michigan Supreme Court, issued June 26, 1990, denying delayed application leave to appeal, in Jerry P. Cawley v. President Of Johns Hopkins University, and Johns Hopkins University Press; President Of Brown University, The Board Of Regents, The University Of Michigan, State Of Michigan Supreme Court Action # 87745 (case # 104130 in the Michigan Court Of Appeals; action # 87-032631-CK in Circuit Court)

Note: The caption erroneously leaves out the two lead individual defendants: Thomas J. Anton, and Trudi C. Miller.

--The text of the ORDER follows below:

On order of the Court, the delayed application for leave to appeal is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of Court.

June 26, 1990

Jacqueline B. MacKinnon

Deputy Clerk

EXHIBIT # 3

Memorandum ORDER of the Michigan Court Of Appeals (Panel: Presiding Judge Myron H. Wahls; Judges-- Martin M. Doctoroff; Thomas J. Brennan), issued October 16, 1989, denying timely motion for rehearing, in Jerry P. Cawley v. President Johns Hopkins University, et al.; State Of Michigan Court Of Appeals action # 104130; Circuit Court action # 87-032631-CK

--The text of the ORDER follows on the next page.

The Court orders that the motion for rehearing is DENIED.

A true copy entered and certified by Norbert G. Jaworski, Chief Clerk, on October 16, 1989.

Norbert G. Jaworski

Chief Clerk

EXHIBIT # 4

Unpublished Memorandum Opinion of the Michigan Court Of Appeals (Panel: Presiding Judge Myron H. Wahls; Judges--Martin M. Doctoroff; Thomas J. Brennan), issued August 4, 1989, affirming with a different emphasis the trial court holding, in Jerry P. Cawley v. President Of Johns Hopkins University, and Johns Hopkins University Press; President Of Brown University, The Board Of Regents, The University Of Michigan, State Of Michigan Court Of Appeals action # 104130; Circuit Court action # 87-032631-CK.

Note: The caption erroneously leaves out the two lead individual defendants: Thomas J. Anton, and Trudi C. Miller.

MEMORANDUM.

Plaintiff, Jerry P. Cawley, appeals as of right from a September 28, 1987, order of the Washtenaw Circuit Court dismissing plaintiff's complaint based on the federal preemption of his claims, Harper & Row Publishers, Inc v Nation Enterprises, 501 F Supp 848, 850 (SD NY, 1980), aff'd 723 F 2d 195 (CA 2, 1983), rev'd on other grounds 471 US 539; 105 S Ct 2218; 85 L Ed 2d 588 (1985), and the failure to state a claim on which relief can be granted, MCR 2.116(C)(8). The September 28, 1987, order was issued after the circuit court reviewed and considered the parties' briefs and supplemental briefs, heard the oral arguments of counsel and issued a nineteen-page opinion on September 15,

1987.

We believe that the circuit court's September 15, 1987, opinion is exhaustive, comprehensive, accurate and well reasoned, and are hard-pressed to add anything of significance to it. Accordingly, we adopt it as our own.

Affirmed.

/s/ Myron H. Wahls

/s/ Martin M. Doctoroff

/s/ Thomas J. Brennan

EXHIBIT # 5

ORDER OF DISMISSAL entered by the State of Michigan trial court, issued September 28, 1987, in Jerry P. Cawley v. Steven Muller, President Of Johns Hopkins University, and Johns Hopkins University Press; Howard Swearer, President of Brown University; Thomas J. Anton; Trudi C. Miller; The Board of Regents, The University of Michigan, State of Michigan, Circuit Court For Washtenaw County, The Honorable William F. Ager, Jr., Civil Action 87-032631-CK

--The text of the ORDER OF DISMISSAL begins on the next page.

ORDER OF DISMISSAL

At a session of said Court held in the Courthouse in the City of Ann Arbor, County of Washtenaw, State of Michigan this 28th day of September, 1987.

PRESENT: THE HONORABLE WILLIAM F. AGER, JR.
Circuit Judge

Plaintiff Jerry P. Cawley having filed the above-entitled case on January 2, 1987, asserting various state law claims; a first amended complaint having been filed on April 23, 1987; defendants having moved on May 14, 1987, to dismiss plaintiff's first amended complaint based on federal preemption

(End p. 1; begin p. 2)

of plaintiff's claims and a failure to state a claim; a hearing having been held in open court on June 11, 1987, at which time the defendants, through their attorneys, DAVIS and FAJEN, P.C., and plaintiff appeared and presented oral argument; and the Court having reviewed the parties' supplemental briefs, having rendered its written opinion in the case on September 15, 1987, and being fully advised in the premises; Now, Therefore,

IT IS ORDERED, ADJUDGED AND DECREED that defendants' motion is GRANTED, and the first amended complaint is DISMISSED ("with prejudice" qualifier hereat <u>SUA SPONTE struck out</u> by the State trial judge)

in its entirety for the reasons set forth in the Court's September 15, 1987, written opinion.

Hon. William F. Ager, Jr.
Circuit Judge

Submitted Under
MCR 2.602(B)(3)

PREPARED AND PRESENTED BY:
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EXHIBIT # 6

OPINION of the State of Michigan trial court, issued September 15, 1987, in Jerry P. Cawley v. Steven Muller, President Of Johns Hopkins University, and Johns Hopkins University Press; Howard Swearer, President of Brown University; Thomas J. Anton; Trudi C. Miller; The Board of Regents, The University of Michigan, State of Michigan, Circuit Court For Washtenaw County, The Honorable William F. Ager, Jr., Civil Action 87-032631-CK

--Page 1 of 19 begins on the next Appendix page.

(Begin p. 1)

Before the court is a motion to dismiss plaintiff's complaint pursuant to MCR 2.116(C)(1) and (8). The events giving rise to the basis of the suit, although occurring over an extended period of time, are quite straightforward. In accordance with prevailing authority, the facts will be construed most favorably to the non-moving party. Beardsley v. R. J. Manning Co., 2 Mich. App. 172 (1966). A motion for summary judgment for failure to state a claim for which relief may be granted is to be tested by the pleadings alone; the motion tests the legal basis of the complaint, not whether it can be factually supported. Knapp v. Moreno, 137 Mich. App. 769 (1984). In considering such a motion, the court will take all factual allegations of

the complaint as true along with any inferences that can be fairly drawn therefrom. Feaster v. Hous, 137 Mich. App. 783 (1984). However, the party opposing the motion must present facts of substantial nature and may not rely on conclusions of law for their support. Provenzino v. Merchants Forwarding, 363 F.Supp. 168 (1973). Although the court is bound to accept all well-pled allegations of fact as true, that principle does not extend to conclusions or to statements obviously resting on opinion. George v. Haber, 343 Mich. 218 (1955). Further, courts are bound to take notice of the limits imposed upon them and recognize the bases of jurisdiction. Where a court so recognizes its lack of jurisdiction over the subject matter, it must dismiss or otherwise dispose of the

action. Fox v. Board of Regents, 375 Mich. 238 (1965).

In light of plaintiff's extraordinary pleadings, a review of the facts is particularly pertinent here. Plaintiff's "common allegations" state that defendants Miller and Anton entered into a contract for the production of literature. (The Miller/Anton contract is irrelevant to these proceedings as there have been no claims of third party beneficiary. Accordingly, that contract will not be considered further). In connection with the contract to produce the literature (hereinafter the "manuscript"), plaintiff alleges that defendant

(End p. 1; begin p. 2)

Anton entered into a second contract to engage plaintiff as a

research assistant and contributor to the manuscript. Plaintiff also alleges that, under the terms of yet another contract (Miller/Anton/Cawley), the final manuscript was to be published as part of a aymposium book to be edited by Miller. (It is unclear from plaintiff's pleadings whether this contract to publish was, in fact, the same contract entered into between Miller and Anton. The resulting aim of both contracts appear to be identical. However, for the benefit of plaintiff, a third contract will be presumed to have existed).

The alleged Anton/Cawley and Miller/Anton/Cawley contracts are the focusing points of this action in many respects. The terms of the Anton/ Cawley contract, as alleged, obligated plaintiff as a "graduate student

apprentice co-author" of a joint manuscript entitled "Intergovernmental Change in the United States: Myth and Reality." In lieu of monetary compensation plaintiff "received junior co-author ownership title to the manuscript." Admittedly, defendant Anton "retained final control of the manuscript."

The final "pre-publication" manuscript was published in 1980 by the University of Michigan Press. Apparantly no copyright notice or claim was attached to that publication. However, that release did comply with the terms of the Anton/Cawley contract in so far as attributing co-authorship to plaintiff. ("Co-authorship" and "credit" as used by plaintiff in alleging that he provided assistance in the preparation of the manuscript are

treated as synonymous). Subsequently, the manuscript was published as part of the scheduled symposium book edited by defendant Miller. That publication, containing a derivative of the original manuscript, was published as Public Sector Performance: A conceptual Turning Point, Trudi C. Miller, Johns Hopkins University Press, 1984 (hereinafter "book version"). The manuscript appeared in the book as "Intergovernmental Change in the United States: An Assessment of the Literature." The symposium book contained a copyright notice. Defendant Anton was credited as the sole author - plaintiff's name did not appear. A review of both the original manuscript and the book version reveals

(End p. 2; begin p. 3)

that they are

substantially the same text. Thus, the two contracts, assuming for the benefit of plaintiff that they truly existed in law and fact, create the foundation for all claims presented by plaintiff.

In an effort to condense the above facts into a workable order, they may be summarized as follows:

1. Plaintiff alleges a contract between Anton and Cawley to produce the manuscript;
2. Plaintiff alleges a contract between Miller, Anton, and Cawley to publish the manuscript;
3. Plaintiff alleges that both contracts provided that co-authorship of the manuscript would be attributed to Cawley;
4. When the book version of the

manuscript was published with a notice of copyright, no attribution of co-authorship was given to plaintiff; and

5. Plaintiff alleges that as a result of the book version publication without attribution of co-authorship given to him, he is entitled to damages under various legal and equitable theories.

The issue before the court can be simplified into one question: are the claims raised by plaintiff sufficient to constitute a cause of action for which relief may be granted, and, if so, are those claims preempted by exclusive federal jurisdiction under the Copyright Act of 1976.

"On or after January 1, 1978, all legal and equitable rights

that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that date and whether

(End p. 3; begin p. 4)

published or unpublished, are governed exclusively by this title. Therefore, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any state."

17 U.S.C.A. § 301.

It is important, relative to

preemption, to understand the development and purpose of that clause. The exclusive rights referred to in section 106 include "exclusive rights to do and to authorize any of the following: (1) to reproduce the copyrighted work...; (2) to prepare derivative works based upon the copyrighted work...; (3) to distribute copies...." 17 U.S.C.A. § 106. "The exclusive rights accorded to a copyright owner under section 106 (this section) are 'to do and to authorize' any of the activities specified.... Use of the phrase 'to authorize' is intended to avoid any questions as to the liability of contributory infringers. For example, a person who lawfully acquires an authorized copy of a motion picture would be an infringer if he or she engages in the business of renting it

to others for purposes of unauthorized public performance." H.R. Rep. No. 94-1476, 94th Cong., 2nd Sess. at 132, U.S. Cong. & Admin. News 1976. Similarly, this case involves allegations of abuse of a right to publish by one co-author causing damages to the other co-author. It is in this context that a dispute between the parties over the application of the preemption clause has arisen. Defendants contend that where plaintiff alleges legally sound causes of action, preemption applies. Plaintiff opposes that contention.

The statute provides preemption where two elements are met: (1) that the work is within the subject matter of the Act, and (2) that the rights claimed are equivalent to rights conferred under the Act. Numerous

state and federal courts have interpreted the preemption provision. Both elements are satisfied in the

(End p. 4; begin p. 5)

present case. There is no dispute that the manuscript, whether it be in the original version or a derivative work, is within the subject matter of copyright law. Further, the claims raised by plaintiff, at least at first blush, are equivalent to rights protected by the Act. It is the equivalency standard that raises difficult questions in these proceedings.

The courts have allowed state claims to stand where the claims were not within the intended protection of the Act. The standard used in those cases requires a finding of some departure from the scope of the rights

protected by the Act. Thus the courts have required a showing of some "extra element" to establish circumstances that would bring the cause of action out of the scope of copyright protections. Mayer v. Josiah Wedgewood, 601 F.Supp. 1523 (S.D.N.Y. 1985) "(T)o assert a state law claim, a plaintiff must allege rights 'qualitatively different from the rights of reproduction, performance, distribution, or display.'" Brignoli v. Balch Hardy and Scheinman, Inc., 645 F.Supp. 1201 (S.D.N.Y. 1986); (citing Harper & Row Publishers, Inc. v. Nation Enterprises, 501 F.Supp. 848 (S.D.N.Y. 1980)). With the foregoing as a basis, each of paintiff's claims will be considered.

CONTRACT CLAIMS - Counts 1 and 2.

Plaintiff alleges breach of

contract in Counts 1 and 2. If the facts as alleged are taken as true, this court is satisfied that plaintiff has sufficiently met his burden in pleading a cause of action for which relief could be granted. Inasmuch as valid causes of action may exist, they must be tested as to defendants' challenge of preemption. Plaintiff claims that Counts 1 and 2 should not be preempted since his allegations of breach of contract are not equivalent to copyright claims. Assuming the terms as alleged, the contracts included provisions for the subject matter of the manuscript, the duties and responsibilities of the contributors, and when, where,

(end p. 5; begin p. 6)

and by whom the manuscript should be published. The contract apparently

included also terms for the acknowledgments of credit to contributors to the manuscript.

Federal cases and treaties are quite exhaustive in the treatment of the preemption provisions. Often there msy be a fine distinction between claims that are preempted and those that are not. A close analysis of Counts 1 and 2 illuminates the necessity of preemption.

Plaintiff argues that "... failure to attribute authorship.. properly is a right not protected by federal copyright law." (Plaintiff's Supplemental Brief, p. 20). Plaintiff relies on footnote 43.3, 1 Nimmer, The Law of Copyright 1-12, 1-13 (re: author's analysis of Editorial Photocolor Archives, Inc. v. The Granger Collection, (1983-1984) Copyright Law Decisions (CCH) ¶25,547, (N.Y. App. Div.

1983). Plaintiff's reliance is clearly wrong. Plaintiff evidently asserts that failure to attribute his co-authorship status is the same as a false representation as to the identity of the author. In Granger, the false representation occurred where the defendant removed plaintiff's name from an existing collection of photograhic slides and copied them after placing its own name on the collection. In the case of the Anton/Cawley manuscript, defendant had a right to place his name on the publication of the manuscript. The only wrong that may have occurred was the omission of plaintiff's name as a contributor. Contrary to plaintiff's position, "although (Section) 106 does not explicitly protect the right of attribution of authorship, assertion of such a claim in an otherwise preempted

common law action will not save the common law claim from pre-emption." Peckarsky v. American Broadcasting Cos., 603 F.Supp. 688 (D.D.C. 1984) (fns. omitted)(citing Suid v. Newsweek, 503 F.Supp. 146 (D.D.C. 1980)).

"To the extent plaintiff rests his contract claim not on breach of terms of the contract itself but on the reproduction

(end p. 6; begin p. 7)

without credit, the claim is preempted." Smith v. Weinstein, 578 F.Supp. 1297 (S.D.N.Y. 1984). Notwithstanding that plaintiff describes his claim as "failure to attribute," he claims that it is not the mere reproduction of the work that gives rise to these claims, but rather that these are "terms of contract rights." However, "plaintiff cannot merely rephrase the

same claim citing contract law and thereby obtain relief equivalent to that which he has failed to obtain under copyright law." Ibid. "In essence, a right which is 'equivalent to copyright' is one which is infringed by the mere act of reproduction, performance, distribution or display." 1 Nimmer, supra at p. 1-11. The terms of the Anton/Cawley contract included the production of the manuscript in exchange for plaintiff getting credit for assistance when the manuscript was to be published. The breach of the contract could not occur under these circumstances unless it was published contrary to the terms, i.e., without credit to plaintiff as a contributor. As plaintiff has accurately acknowledged, the only other possible breach (abscent reproduction) that could occur would be if the article were never published. If

that were the case, plaintiff's claim might stand independently. However, those facts have not been alleged and the court cannot act merely on hypotheticals.

Plaintiff mistakenly relies on Smith v. Weinstein, supra, as supporting his contract theory. The facts in Weinstein that support a contract theory without preemption are substantially different from the case before this court. In Weinstein, the plaintiff alleged that he was entitled to monetary compensation for work he produced pursuant to a contract. The court held that plaintiff's claim for unpaid compensation constituted an added element which made the claim different from rights protected under the Copyright Act. The non-payment of compensation was not a direct result of the publication or reproduction. The monetary compensation

element could occur regardless

(end p. 7; begin p. 8)

of reproduction or distribution and thus not subject to preemption. Here, plaintiff's contract claims are exclusively related to the reproduction without credit. No matter how plaintiff describes the circumstances, the facts remain the same. Count 1 involves a term of an alleged contract to assist in the production of the manuscript. Plaintiff was to be compensated by receiving co-authorship credit. The only way that plaintiff could be compensated in accordance with the terms of the contract was if the second publication occurred. When plaintiff did not receive the credit upon the second publication, his cause of action arose. Accordingly, since plaintiff's claim of breach of contract

under Count 1 is solely dependant upon the publication of the book version, that claim is within the general scope of copyright law and Count 1 is preempted.

Similarly, Count 2 alleges the breach of the terms related to "where to publish an article." The Anton/Cawley contract claims are nearly identical to the Miller/Anton/Cawley claims with respect to the preemption clause. As plaintiff claims, the latter is a contract to reproduce the manuscript in a specified publication. Plaintiff states that the breach is conclusively proven by virtue of the 1984 publication, but that the publication is incidental to the contract claim. Plaintiff then reasserts the arguments previously made relative to the preemption of the Anton/Cawley contract claims under Count 1. It

is clear that these claims are, in essence, the same claim of breach, albeit asserted against different parties for slightly different reasons. The breach was not that the manuscript did not appear in the specified publication, but only that co-authorship was not attributed to plaintiff. Hence, the above arguments do in fact apply to the claims of Count 2 as well as Count 1. Accordingly, Count 2 is also preempted.

(End p. 8; begin p. 9)

UNFAIR COMPETITION - Count 3.

Plaintiff alleges in paragraphs 60 and 63 of his Amended Complaint that the manuscript was published "in violation of fiduciary duties not to compete..." and that such "conduct constitutes unfair competition." State claims will not survive preemption merely by joining allegations of fiduciary responsibilities

with unfair competition. Ronald Litoff, LTD. v. American Exp.Co., 621 F.Supp. 981 (D.C.N.Y. 1985). In Litoff, the plaintiff combined allegations of unfair competition and breach of a confidential relationship. The court dismissed the claim as preempted by the Copyright Act.

In this case, as in Peckarsky v. American Broadcasting Cos., supra, "the thrust of the unfair competition claim is that defendants improperly made unauthorized use of the material... and failed to provide (plaintiff) with compensation and... credit therefor. The rights to the use or reproduction of copyrighted work are explicitly protected by section 106 of the Copyright Act." Peckarasky, supra, at p. 695; see also Orth-O-Vision Inc. v. Home Box Office, 474 F.Supp. 672 (S.D.N.Y. 1979).

The only recognized exception to

preemption of unfair competition claims is when that claim is presented in the form of "passing off." Warner Brow. v. American Broadcasting Cos., 720 F.2d 231 (2d Cir. 1983). That term is generally used in connection with allegations arising out of the Lanham Patent Act, 15 U.S.C. (Section) 1125, et. seq. Although there may be some application in copyright cases, i.e., copyright of artistic designs, "passing off" does not apply in this case. "Passing off" does not apply where a co-author who admittedly has a right to attach his name, does so abscent the name of an associate contributor. "Passing off" is more appropriately applied where a work is published by one who had not authored it nor assisted in its preparation. If, for example, defendant Anton

(End p. 9; begin p. 10)

had not participated in the preparation of the manuscript, therefore having no right to claim authorship, publication under his name would constitute "passing off." However, here, as in Weinstein, "to the extent that plaintiff relies on unfair competition... derived from the use of his ideas, he is stating a claim based on rights equivalent to those protected by copyright." Smith v. Weinstein, supra, at p. 1307. As stated earlier, the attachment of fiduciary claims to unfair competition does not rescue the claim from preemption.

BREACH OF FIDUCIARY DUTY - Count 4.

Plaintiff alleges in paragraph 65 of his Amended Complaint that under the terms of the various contracts, defendants Miller and Anton owed plaintiff a

fiduciary duty to properly publish the manuscript "under both co-author's appropriate title of ownership."

It is generally recognized that where state law provides that breach of a fiduciary duty is actionable, it will not be preempted by the Copyright Act. Sargent v. American Greeting Company, 588 F.Supp. 912 (N.D. Ohio E.D. 1984). However, as Nimmer points out, a breach of trust requires the existence of a trust relationship. 1 Nimmer, supra, (Section) 1.01(B), 1-114.1 (fn. omitted).

Plaintiff unfortunately relies too heavily on Walker v. Time Life Films, Inc., 615 F.Supp. 430 (S.D.N.Y. 1985), without understanding its implications. In Walker, no fiduciary relationship was found by the court. Similarly, plaintiff here fails to adequately allege facts which this court can construe as a

confidential or fiduciary relationship. Plaintiff asserts in Sec. J-1.3 (Supplemental Brieff, p. 33) that his fiduciary duty claim "protects Plaintiff Cawley's right to receive the proper benefits of his trust, fiduciary reliance upon Defendants to execute the full terms of a publication agreement." In essesnce, plaintiff is converting expectation that the terms of a contract will be complied with into a fiduciary duty theory. Where there might actually be some elements of a fiduciary

(End p. 10; begin p. 11)

relationship between some of the parties, this court cannot extrapolate from plaintiff's pleadings sufficient allegations that would constitute such a relationship. In Walker, the state court recognized that plaintiff's claims of breach of fiduciary and

confidential relationship were simply redundant and equivalent to copyright protections and asserted for the purpose of avoiding federal preemption. Here plaintiff insufficiently alleges such a relationship and merely rephrases and complicates other claims to avoid preemption. Consequently, plaintiff has failed to state a cause of action upon which relief can be granted. Accordingly, Count 4 is dismissed.

UNJUST ENRICHMENT - Count 5.

Plaintiff alleges in Count 5 of his Amended Complaint that subject to the terms of his contract with defendant Anton, plaintiff accepted a promise that he would receive co-authorship credit in lieu of monetary compensation. Plaintiff contends that "Defendant Anton's failure to effect publication... under joint

co-authorship title... constitutes unjust enrichment...."

Preemption of unjust enrichment claims could not be explained more explicitly than in P.I.T.S. Films v. Laconis, 588 F.Supp. 1383 (E.D. Mich S.D. 1984). Defendants correctly point out that the court, in PITS Films, dismissed the unjust enrichment claim as preempted by the Copyright Act. Plaintiff may be correct in his assessment that the court might have decided otherwise had there been a fiduciary claim coupled with the unjust enrichment claim. However, the Amended Complaint does not include fiduciary claims in Count 5, nor has plaintiff sufficiently pleaded a valid fiduciary relationship factually.

Plaintiff evidently believes that by raising fiduciary theory by abstract inuendoes, it will thereafter be applied

generically whenever plaintiff decides it may save a claim from preemption. This court will not do so by creating facts and allegations where they do not exist. Moreover, as this court has already found insufficient

(End p. 11; begin p. 12)

facts and allegations to construe such a relationship, the unjust enrichment claim must be considered individually. Accordingly, Count 5 is preempted.

INTERFERENCE WITH CONTRACT - Count 6.

Plaintiff alleges in Count 6 that defendant Anton was aware of the contract with Miller to publish the manuscript, and that Anton "maliciously interfered with said contract." Congress could not have made its intent clearer on preemption of such a claim. "(T)o the extent

that the unfair competition concept known as 'interference with contract relations' is merely the equivalent of copyright protection, it is preempted." H.R. Rep. No 94-1476, 94th Cong., 2nd Sess. at 132, U.S. Code Cong. & Admin. News 1976, at p. 5748. The courts have consistently followed that intent.

Plaintiff argues that, according to Harper & Row Publishers, Inc. v. Nation Enterprises, 723 F.2d 195 (2d Cir. 1983), preemption only applies where "the tortious interference results from violation inherent in the publication of an article ... scheduled to be published elsewhere by different party... BUT, if the violation results from NON-PERFORMANCE of an in place contract, then maliscious interference with contract exists under State Law." (sic) A thorough reading of Harper cannot produce any language to sup-

port plaintiff's position. Non-performance of a contract, resulting from another's interference, is the essence of the claim. Merely restating the claim in reverse logic will not avoid preemption.

Plaintiff contends that beeause defendant Anton "malisciously" induced Miller and Johns Hopkins to violate their contract to publish, this will avoid preemption. This argument fails for two reasons. First, assuming that defendant Anton was a party to the contract to publish, the contract was performed, albeit in violation of one essential term; i.e. failure to attribute co-authorship. Second,

(End p. 12; begin p. 13)

"...the fact that (plaintiff) pleaded additional elements of awareness and intentional interference,... goes merely to the scope of the

right; it does not establish qualitatively different conduct on the part of the infringing party, nor a fundamental nonequivalence between the state and federal rights implicated." Harper & Row Publishers, Inc. v. Nation Enterprises, supra at p. 201 (affirming the trial court's opinion, Harper & Row Publishers, Inc. v. Nation Enterprises, 501 F.Supp. 848, 853-54 (S.D.N.Y. 1980)); see also Mayer v. Josiah Wedgwood, supra at p. 1535. Plaintiff's claim in Count 6, interference with contract, is preempted. Allegations of defendant Anton's intent add nothing to the claim.

TRESPASS TO INTELLECTUAL PROPERTY -- Count 7.

Plaintiff alleges in Count 7 that his ownership interest in the manuscript constitutes his "professional reputation-

al name trademark," and that the contents of the manuscript constituted trade secrets. Count 7 amounts to a claim of trespass to plaintiff's "intellectual property rights."

After careful consideration of plaintiff's pleadings and all documentary evidence submitted to the court, plaintiff's allegations seem to embody four claims; (1) trade secret infringement, (2) improper use of trademark, (3) invasion of privacy, and (4) invasion of right to publicity. Each of these claims will be considered independantly.

Plaintiff apparantly believes that the contents of the manuscript constituted trade secrets. First, it should be noted that approximately 763 references appear in the bibliography of the original manuscript, of which 28 were previous works written and published by Anton and/

or Cawley (independemtly or as collaborators). Plaintiff states that the manuscript was to be a "literature review." Where the information sought to be protected as a trade secret is made readily available to the public, such information may not be deemed a trade secret unless access to it is actually treated as a secret. Videotronics, Inc. v. Bend Electronics, 564 F.Supp. 1471 (D.Nev 1983). Not only is the manuscript based primarily on previously

(End p. 13; begin p. 14)

published works, but the manuscript itself was distributed by the University of Michigan Press in 1980 in a "pre-publication" printing. As such, the publication of the manuscript, albeit in pre-publication format, constituted public disclosure of whatever trade

secrets might possibly have been contained therein. Consequently, the manuscript cannot be deemed to have contained trade secrets.

To the extent that it may be discernible, plaintiff claims that the manuscript, if published properly, would constitute his trademark "as a scholar of integrity and quality...." It is a rare thing to attach claims of trade mark infringement to works of literature. Indeed, "literary property in a book cannot be protected by trade-mark, nor otherwise than by copyright." Atlas Mfg. Co. v. Street & Smith, 204 F. 398 (8th Cir. 1913). Moreover, "copyright laws are based on an entirely different concept than the trademark laws...." Boston Pro Hockey Ass'n. v. Dallas Cap & E. Mfg., Inc., 510 F.2d 1004 (5th Cir. 1975). The fundamental distinction

between copyright and trademark is that the former applies to art and literature while the latter applies to merchandise. The essence of plaintiff's claim is that the published book version without attribution of co-aithorship to plaintiff constitutes an infringement on his reputation as a scholar. As has been noted, such a claim for failure to attribute will not avoid preemption. Likewise, this court is reluctant to extend the application of trade-mark infringement to plaintiff's manuscript as representing a trade-mark of his scholarship.

Plaintiff also contends that in accord with (Sec.) 652A et.seq. of the Restatement of Torts, 2d, he should "be let alone to develop his trade secrets ...." Plaintiff's claim is not well founded. Plaintiff apparently relies on (Sec.) 652E of the Restatement; i.e.,

publicity that unreasonably places another in a false light. Although "publication" is not required, publicity by widespread dissemination is required.

(End p. 14; begin p. 15)

Such a claim is probably impossible under the present circumstances. If the manuscript were published <u>with</u> plaintiff's name a part thereof, there would be no false light. Only by publication <u>without</u> plaintiff's name is there a false light created, but plaintiff would then be unidentified resulting in no publicity. Accordingly, plaintiff's claim must fail.

Finally, plaintiff claims an invasion of his "rights to publicity in the control of access to his intellectual property." Plaintiff cites <u>Zacchini v. Scripts-Howard Broadcasting Co.</u>, 433 U.S. 562 (1977)) in support of his claim.

The plaintiff in Zacchini claimed an invasion of his right to publicity of his circus act as "the Human Cannonball." A video taping of a portion of his performance was aired on a television news program shortly after the performance. Zacchini claimed that this operated as an infringement on his right to control all publicity of his act. Zacchini is clearly distinguishable on facts and substance. Plaintiff claims that he has a right to control the publication of the manuscript which he co-authored. Indeed plaintiff may have such rights, but under copyright law. A copyright confers the exclusive right to copy the copyrighted work and the right not to have others copy it. Alfred Bell & Co. v. Catalda, 191 F.2d 99 (2d Cir. 1951); Grove Press, Inc. v. Greenleaf Publishing Company, 247 F.Supp. 518 (E.D.N.Y.

1965). To the extent plaintiff's claim is for an invasion of his right to control the use of the manuscript, it is preempted by the Copyright Act. To the extent plaintiff's claim is for trade secret infringement, improper use of trademark or invarion of privacy, plaintiff fails to state any claim upon which relief can be granted.

(End p. 15; begin p. 16)

CONVERSION - Count 8.

In Count 8, plaintiff repeats Count 7 as a claim for "malicious, or fraudulent conversion of intellectual property rights." Plaintiff is mistaken in his application of conversion to non-tangible interests. Plaintiff believes that defendants have converted to their own use plaintiff's rights in control of the use of the manuscript. Evidently plain-

tiff believes that the Copyright Act affords protection "solely to mere form of expression" and does not protect the content or control of the work. As has been discussed throughout this opinion, and as is obvious from the language of the Act, these are precisely the protections offered by the Act. The Copyright Act affords protection, not to abstract and undocumented ideas, but rather the memorialization of those ideas. Such protections include protection from unauthorized use. Alfred Bell & Co. v. Catalda, supra.

To the extent that plaintiff claims conversion, his claim is made in the abstract, applied to whom shall have control over the manuscript. "Conversion, as thus described, is a tort involving acts - possession and control of chattels...." Harper & Row Publish-

ers, supra, at p. 195. Although a valid claim of conversion is not subject to preemption, plaintiff has failed to present a valid claim. "Conversion requires not merely temporary interference with property rights, but the exercise of unauthorized dominion and control to the complete exclusion of the rightful possessor." Id.; see also Oddo v. Ries, 743 F.2d 630 (9th Cir. 1984); Pearson v. Dodd, 410 F.2d 701 (D.D.C. 1969), cert. den. 89 S.Ct. 2021 (1969). For example, if a manuscript is wrongfully appropriated, copied, altered, and published by someone without authority to do so, a claim for conversion might arise and withstand preemption. Here however, plaintiff's claims of a "right to control publication" are not within the meaning of property rights in the context of conversion claims.

Further, defendant Anton had a right to possess the manuscript as well as a right to subsequent use, as did plaintiff. Plaintiff was not excluded from his own use of the manuscript, only his control over the book version. Such a claim to that right to control publication is not a proper entitlement subject to a conversion claim. Plaintiff's

(End p. 16; begin p. 17)

claim fails to state a cause of action and is therefore dismissed.

MISAPPROPRIATION, DECEPTIVE TRADE PRACTICE, PRODUCT LIABILITY - Count 9.

In Count 9 plaintiff alleges an ambiguous concoction of wrongs that fails to present anything that barely resembles a valid cause of action. Plaintiff's claims appear to be for "inverse

misappropriation," deceptive trade practices, and/or "literary product liability."

If it is plaintiff's intent to allege misappropriation, the claim is preempted by the Copyright Act. Warner Bros. v. American Broadcasting Companies, supra at p. 247; Durhan Industries, Inc. v. Tomy Corp., 630 F.2d 905 (2d Cir. 1980). To the extent that plaintiff's claims amount to allegations of deceptive trade practices, plaintiff has failed to allege any facts to constitute a cause of action. See Walker v. Time Life, supra at p. 441.

Turning to plaintiff's claim of "literary product liability," this court finds the claim too far-fetched to constitute any valid cause of action. Plaintiff's claim that his "digestion" of the book version is analogous to the

consumption of spoiled tuna fish is certainly creative, but far beyond any principles of accepted legal theory. The claim warrents only minimal analysis. All of the authority cited by plaintiff confirms this court's understanding of product liability law. Nothing suggests, even remotely, that plaintiff's claim is plausible. This court is simply unwilling to stretch the boundaries of product liability theory so far as to include literary works. To do so would similarly allow unsatisfied patrons of the arts such as the threatre, symphony, or other such artistic and interpretive performances, to claim product liability.

If plaintiff's allegations in Count 9 <u>might</u> rise to a valid claim for which relief could be granted, this court believes they arise directly out of the publication of the book version. Thus

the claims would be preempted by the Copyright Act.

(End p. 17; begin p. 18)

CONCLUSION

This court is certainly sympathetic to a party who presents his claims in propria persona. Plaintiff makes a valiant effort to protect his interests. However, this court feels no duty to either educate plaintiff in such diverse theories of law that he embarks upon, nor to act as plaintiff's attorney on his behalf. This court has made all attempts to be lebient and open-minded in considering plaintiff's claims. However, the of copyright is far less complicated than plaintiff makes it appear. Copyright law embodies three basic rights; (1) the right to reproduce a copyrighted work, (2) the right to prepare derivative works,

and (3) the right of distribution. 1 Nimmer, The Law of Copyright, supra at (Sections) 8.02(A), 8.09(A), 8.11. All of plaintiff's claims are derived from one simple act of defendants. That act was the publication of the book version of the manuscript without giving co-authorship credit to plaintiff to which he was entitled. Such a claim is no more or less than a claim of un-authorized use of a copyrightable work. As the above authority directs, a claim of unauthorized use falls squarely within the preemption clause of the Copyright Act. It becomes obvious that plaintiff's claims are the essence of copyright law. Accordingly, this courts finds that Counts 1, 2, 3, 5, and 6 are preempted by the Copyright Act and are therefore dismissed for lack of jurisdiction. Counts 4 and 8 fail to state a cause of

action for which relief can be granted and are likewise dismissed. In Count 7, to the extent that plaintiff's claim is for trade secret infringement, invasion of privacy, trademark infringement, and/or invasion of right to publicity, plaintiff fails to state a cause of action for which relief can be granted and the claims are dismissed. To the extent that plaintiff claims an invasion of his right to control publication of the manuscript in Count 7, the claim

(End p. 18; begin p. 19)

is preempted by the Copyright Act and is therefore dismissed for lack of jurisdiction. Count 9 of plaintiff's amended complaint to the extent that the claim is for misappropriation, is preempted by the Copyright Act and is therefore dismissed for lack of jurisdiction. To the extent that Count 9 alleges deceptive trade

practices and/or "literary product liability"; plaintiff has failed to state a cause of action for which relief can be granted and the claims are therefore dismissed.

Counsel for defendants shall prepare a judgment in accordance with this Court's opinion and present it to the Court for signature, after presenting it to plaintiff for approval as to form only.

WILLIAM F. AGER, JR.,
CIRCUIT JUDGE
P-10066

EXHIBIT # 7

ORAL HEARING TRANSCRIPT of the Thursday, June 11, 1987 hearing in Cawley v. Muller, et al., State of Michigan, Circuit Court For Washtenaw County, Civil Action 87-032631-CK, before The Honorable William F. Ager, Jr.

--Beverly Marshall (CER 0934)
Official Court Reporter/Recorder

--Page 1 of the 15 page Transcript is the title page summarized above; page 2 begins on the next Appendix page.

(From p. 1)

APPEARANCES:

Robert Southard

Attorney At Law

Appearing on behalf of the

Plaintiff

Bradley J. MeLampy

Attorney At Law

Appearing on behalf of the

Defendant

(End p.1; begin p. 2)

Ann Arbor, Michigan

Thursday, June 11, 1987

— — —

CLERK OF THE COURT: Calling the case of Jerry Cawley vs Steven Muller, case number 87-32631-CK.

MR. MELAMPY: I am Brad Melampy representing the Defendant in this case.

MR. SOUTHARD: Bob Southard, your Honor, representing Jerry Cawley, the Plaintiff.

THE COURT: What do we have before the Court today?

MR. MELAMPY: Your Honor, this is a motion to dismiss Plaintiff's Amended Complaint, on two grounds. The first ground is that his claims are pre-empted by the Federal Copyright Act, and also because this Court doesn't have any jurisdiction --

THE COURT: By the Copyright Act?

MR. MELAMPY: By the U.S. Copyright Act.

THE COURT: We have very, very few Copyright Acts let me tell you. When was the Amended Complaint filed?

MR. MELAMPY: I think the Complaint was filed your Honor, April 23 of this year.

THE COURT: Is there a File Number on this also, too, do you know? How long is the original Amended or the original Complaint?

(End p. 2; begin p. 3)

MR. MELAMPY: It was a couple inches thick, your Honor.

THE COURT: A hundred pages?

MR. SOUTHARD: The Amended Complaint is 17 pages.

THE COURT: That's tremendous, it's cut down from a hundred and some pages to 17.

All right, you may proceed, counsel, with the understanding that you filed your motion and your brief, have you?

MR. MELAMPY: Yes, I have, your Honor.

THE COURT: All right, we give you both five minutes, and he tells you when you have one minute left and you may save that for rebuttal, if you want to.

All right, you may proceed.

MR. MELAMPY: Your Honor, I will first address the pre-emption claim. In the Amended Complaint, the Plaintiff claims that an article was written in 1980, called Inter Governmental Change In The U.S., Myth And Reality. It was authored by a co-Defendant Thomas Anton. And on that article it said, with the assistance of Jerry P. Cawley. I think Mr. Cawley is alleging in the complaint that his credit, with the assistance of, was something that was in the nature of an agreement between he and Professor Anton.

(End p. 3; begin p. 4)

What happended was, this article eventually got published in 1984, as the Plaintiff alleges, by the Defendant John Hopkins University Press in Baltimore, Maryland. But, it didn't have Mr.

Cawley's name on it. As a result Mr. Cawley claims he's been injured as a result of this publication.

All nine of Plaintiff's complaints, your Honor, deal with the unauthorized reproduction of this 1980 article without Mr. Cawley's name on it.

Now, the United States Copyright Act, says in Section 301, that any State Law Claim brought to protect a right equivalent to any right protected exclusively under the Copyright Act, is pre-empted.

THE COURT: Say that again, would you repeat that?

MR. MELAMPY: Any State Law Claim brought to protect a right which is equivalent to a right exclusively protected under the Copyright Act, is preempted. So what we're focusing on is rights and as my brief sets forth, the

case law says that the focus is on the equivalency of the State Law right to any of the rights under the Copyright Act. If they're equivalent then there's a pre-emption and it can only be heard in Federal Court.

Some of the Plaintiff's claims, your Honor, are couched in various forms; breach of contract, unjust

(End p. 4; begin p. 5)

enrichment, unfair competition. The claims look different but the rights that they're trying to protect are equivalent to copyrights. The term of the contract that's being breached is the unauthorized publication of this article without Mr. Cawley's name on it.

Counts two and count four, are fiduciary duty claims. The breach of fiduciary duty that Plaintiff claims he

suffered was, a publication of this article without his name on it in 1984. The main point of this motion, your Honor, deal with the unauthorized 1984 publication of that article. And the right that the Plaintiff is ascerting in each one of those counts, is a right you find under the Copyright Act. Therefore, the copyright says it's pre-empted.

I can't go through all of the counts now, I don't have time, I do them one by one in the brief. Case law, I will mention, has found that claims of unjust enrichment, unfair competition, interference with contract, breach of contract, all in the proper cases have been pre-empted. And the explanation is, because they all dealt with rights in the reproduction of a work. I'm saying that all of Plaintiff's claims are dealing with that same right and on that basis,

his claim should be pre-empted.

My second part of this argument is, that Brown University has no part to this lawsuit and this Court doesn't have any personal jurisdiction.

(End p. 5; begin p. 6)

I filed with my motion, an affidavit of the general counsel of Brown University, a Beverly Ledbetter. In the affidavit she avers that Brown University carries on no continuous or systematic part of their business in Michigan. Brown University is a private University in Providence, Rhode Island. They have no branch of the University here, no office, no real estate, no employees, they're not registered to do business in this State. There only contact at all, your Honor, is they send recruiters or recruitment brochures when highschools request them to do that.

They do that in all 50 States. I don't think there's any general jurisdiction in this case because Brown University doesn't have any contact other than those insignificant contacts.

Further, I don't think there's any limited jurisdiction in this case either. Brown University wasn't involved in the funding, the writing or the publishing of this article in question. Plaintiff alleges that the article was published by Johns Hopkins University Press, in Baltimore, Maryland.

On that basis, Brown University has no connection with this State out of which this lawsuit arises. It's a real twisted agencies theory that Plaintiff is suing Brown University in the first place. I think if he wants to bring that agency claim he has to go to Providence,

(End p. 6; begin p. 7)

Phode Island and file it. So on that basis I don't think this Court has general or limited jurisdiction over Brown University and they should be dismissed immediately.

Thank you.

THE COURT: Counsel, you are suing the University of Michigan, is that right.

MR. SOUTHARD: Yes, your Honor, Board of Regents, through its agents.

THE COURT: Wouldn't that belong in the Court of Claims?

MR. SOUTHARD: I don't think that's ever been put before the Court by this motion.

THE COURT: All right, if you would, mention that in your argument, counsel.

MR. SOUTHARD: Okay. First, let me deal with what's under -- copyright questions first. I think that Defendants have missed a point of what this

complaint is all about. Jerry Cawley's filed an extensive brief with the case law that I will refer to very, very shortly.

What Mr. Cawley is claiming here, is that he had a contract with Mr. Anton, with Ms. Miller, who was involved in trying to get various things published. The contract was, Jerry Cawley gives them an article and they would publish that article. What happens, very simply,

(End p. 7; begin p. 8)

is that Jerry Cawley gives them an article and that article is not published. Now that's the basics of the claim.

We are not after a copyright claim in this lawsuit. We are not saying that the article that was published was a copy of the article we gave them, we're not saying they fringed on Jerry's copyright in this lawsuit.

What we're after here, is the breaches of those underlying duties. Just the same as, your Honor, if your Honor, had a contract with a publisher to publish a book on jurisprudence and they said, if you get us a manuscript by X-date, we'll publish it. You get them the manuscript, they don't publish it, you sue them for breach of contract, you sue them for whatever theories are germaine to that underlying breach. It's not important to us that they published a second article because that's not what we're after in this lawsuit, the questions to that second article are being dealt with elsewhere. What we're after here are the breaches to that underlying agreement. Not just the contract, but the fiduciary, the trust relationship that we've alleged between the parties. Jerry was a graduate

student here, he had fiduciary duties toward him by Defendant Anton. Ms. Miller accepted those fiduciary duties and you can see that in the complaint and you can see that in the breach.

What I want to make clear, your Honor, is

(End p. 8; begin p. 9)

that we're not complaining in this lawsuit that they copied Jerry's article and published it in violation of the copyright. What we're simply saying is, that there was an agreement and it had fiduciary duties involved in it. They breach that agreement. It doesn't make any difference if they never published an article, if they never publish anything, they still breached the agreement.

That's the essence of our response to this copyright pre-emption. Some of the

case law that I8d refer you to, and it's in the brief, is Smith v Weinstein, which is a Federal Case that finds that there's no-preemption. And for some of our other claims the Supreme Court has talked about this pre-emption in the patent and copyright area, in the Kiwanee case, which is cited in the brief.

What this all boils down to, is, as Mr. Melampy has correctly said, is the Plaintiff going after a copyright type of action? Is he saying, look you copied my work and I want reparation for that. In this lawsuit, Jerry's not saying that. Jerry's saying I had a pretty specific contract with these people and they breached it and because they breached it, I suffered in the various ways described in the complaint.

Since I'm limited in my time, I'm

going to leave my argument at that. But say that the brief deals count by count with those, with those arguments.

(End p. 9; begin p. 10)

Specifically our unjust enrichment claim, it has no bearing on copyright. He basically says, that part of this agreement was, that he wouldn't be paid, he wouldn't take any money compensation because they agreed to publish this article later, and that was good enough with him. Well, they didn't publish it, they didn't pay him. He didn't get any money he didn't get anything. That's the claim that most clearly has nothing to do with copyrights and that is the jist of all our counts in this action.

How, as to Defendant Brown University, well, I'm simply going to rely on Mr. Cawley's affidavit, which states very clearly that Defendant Anton was an

agent of Brown University, was employed by Brown University at the time Mr. Anton allegedly interfered with the contract, at the time that Mr. Anton finally breached his duties to publish the article.

I will rely on Mr. Cawley's affidavit that also outlines what contacts he believes Brown University does have with the State of Michigan. I will leave that with, your Honor's, discretion to decide that against Brown University.

As to the Board of Regents and the jurisdiction of this Court, as the Court's well aware -- first of all, as I've said before, that's not before the Court with

(End p. 10; begin p. 11)

this motion, you can bring it on your own motion, I understand that too. As the Court should be aware we

are trying to adjust all the jurisdictions in Jerry's some eight lawsuits or seven lawsuits that he has before this Court. As we discussed probably six weeks ago, we're trying to get a consolidation together so if there's any argument on jurisdiction then it is probably made, between the suits.

Thank you, your Honor.

THE COURT: Counsel?

MR. MELAMPY: On this Federal Court case arising out of this exact same event, filed against the same parties by the Plaintiff, and it's Federal Copyright Infringement Act, and there's nothing different in this complaint than in that complaint. If you take away the publication event, Plaintiff has no claim. Publication in this case is the instance that creates the cause of action Plaintiff is suing on.

If he contracts for the copyright, his rights under copyright, those are copyright controlled issues and those issues should be heard under the Copyright Act.

I would mention the money damages claims in this case, your Honor, this Court still doesn't have jurisdiction. So I would ask the Court in its ruling to address the equitable claims and take note that you don't have jurisdiction, at this point, to the money damage

(End p. 11; begin p. 12)

claims, to rule on the money damage claims.

THE COURT: All right, counsel would you check into the University of Michigan claim. I'll say this, in all probability if it started up there they might well send in back down here, they've been doing this. Recently the

Court of Claims has been sending claims back to the County when one of the Defendants is in the County. Not with our agreement but under orders from the Supreme Court.

Counsel, I'm going to have to spend some time on this. When did you file your briefs with the Plaintiff?

MR. MELAMPY: I think the principle brief with most of the citations was filed two days ago.

THE COURT: What I'm going to do is this. You're going to have plenty of time to do this because to be very frank counsel, back when I was in school in the 18 hundreds, we didn't have special courses in patent and copyrights, we had one seminar on it for senior year students limited to about ten people and I didn't take the course. We have at the most, oh, I would say at the most,

one patent copyright suit a year in our Court. So I'm not too familiar with it. And it will be interesting, it's an interesting subject. In fact, I'll get my law clerk to work a little bit on it because she probably takes the course now.

(End p. 12; begin p. 13)

What I'm going to do then, is give counsel time, any time you feel you'll need to answer opposing parties brief. I would give Defendant a certain amount of time to look at it and answer it and then I'd give Plaintiff time to answer and then give Defendant time to reply. Would you want to do something like that or do you just want me to set a date and if anybody wants to file anything they can file it by a certain date. Which would you rather do?

MR. MELAMPY: I would recommend a

single date, your Honor. Fourteen days, for example, for all further briefing of the issues.

THE COURT: How does that sound?

MR. SOUTHARD: That's fine, your Honor, a single date, fourteen days.

THE COURT: If you find out there is something that you would want to bring to my attention, why then I would want you to do it, of course, even after the time limit but notify the other counsel.

All right, why don't we -- I would give you an extra week if you'd like because I won't be reading them until then anyway, so there's no use for you to get them in just to have them sit. This way it would give you a little more time.

(End p. 13; begin p. 14)

MR. SOUTHARD: That would be fine, your Honor.

THE COURT: Why don't I adjourn this hearing until July 2, 1987. Neither counsel has to be here but that's the deadline for the briefs and then on that time I'll set a date on my opinion. I'm not going to start reading your briefs until then. So ' won't be giving an opinion in a week or anything.

What I'll do is, on the 2nd of July, set the date for my opinion. I'm not going to read the briefs you've filed, until that time. I like to read them all together.

MR. MELAMPY: Your Honor, will that include the issue of Brown University?

THE COURT: Yes, Brown University and University of Michigan, also. As I say, the University of Michigan probably isn't too important because I'm almost assured if you start it up there they'll send it down here anyway but we have to

follow jurisdiction guidelines.

MR. SOUTHARD: I believe we're just going to seek declatory relief here, which would give you jurisdiction against the University of Michigan, but we can brief that, your Honor.

THE COURT: All right, so bring that up too. It would probably be an administrative matter, that you

(End p. 14; begin p. 15)

would file your papers with the Court of Claims, and they would ship them down here.

All right, adjourned to July 2nd and then I'll set a date for my opinion.

Thank you.

MR. SOUTHARD: Thank you, your Honor.

MR. MELAMPY: Thank you, your Honor.

(End p. 15; begin p. 16)

--END OF THE TRANSCRIPT--

EXHIBIT # 8

April 23, 1987 FIRST AMENDED COMPLAINT in Cawley v. Muller, et al., State Of Michigan, Circuit Court For Washtenaw County, Civil Action 87-032631-CK, before The Honorable William F. Ager, Jr.

Plaintiff: Jerry P. Cawley

Defendants: 1) Steven Muller, for Johns Hopkins University;

2) Howard Swearer, for Brown University;

3) Thomas J. Anton;

4) Trudi C. Miller;

5) The Board of Regents, The University of Michigan

--Above information from the Title Page, with Page 1 on the next page.

1. Plaintiff Cawley is a resident of Washtenaw County, State of Michigan.

2. Defendant Steven Muller, for The Johns Hopkins University Defendant, and its agents within its Press, is the president and chief executive officer of The State of Maryland incorporated, private body corporate defendant; The Johns Hopkins University Defendant routinely transacts business within Washtenaw County and The State of Michigan as part of its continuous and systematic general business operations in entering into contracts to publish professional scholarship works thru its Press, and contracts to sell professional scholarship works published by its Press.

3. Defendant Howard Swearer, for the Brown University Defendant, and its faculty agent, Thomas J. Anton, is the

president and chief executive officer of the State of Rhode Island, private body corporate defendant; Brown University possesses general supervisory control over the academic employment arising conduct of its faculty agents and is subject to liability for the conduct of its faculty agents in fulfillment of their Brown University endorsed academic activities.

4. Defendant Thomas J. Anton is now a resident and/or citizen domiciled in Rhode Island; at the time of the matters set forth in this Complaint Mr. Anton was a resident citizen of The State of Michigan, domiciled within Washtenaw County, whose primary place of business was Washtenaw County.

5. Defendant Trudi C. Miller is now, in the alternative, a resident and/or citizen domicile of Minneapolis,

Minnesota, where she is a Professor of Political Science at The University of Minnesota, or of Washington, D.C., where she formally was employed by the U.S. National Science Foundation; at the time of the matters grieved of in this Complaint, Ms. Miller traveled to Ann Arbor, Michigan for the purposes of conducting said business matters grieved of.

6. Defendant Board of Regents is the body corporate charged with governance and administration of The University of Michigan, and conducts business in Washtenaw County, State of Michigan.

7. The transactions and occurrences set forth in this Complaint all originated thru the specified conduct within Washtenaw County, State of Michigan.

8. The chattels and documents at issue

in this Complaint all arise as part of scholarship enterprises housed within The University of Michigan,

(End p. 1; begin p. 2)

within Washtenaw County, State of Michigan.

9. The amount in controversy exceeds $10,000 exclusive of interests and costs, and/or invokes the equity powers of this Court.

COMMON ALLEGATIONS

10. Plaintiff has been a graduate student in the Horace H. Rackham School of Graduate Studies at The University of Michigan since 1974.

11. Plaintiff was employed by the Defendant Board of Regents as a research assistant from February 1978, thru September 1981.

12. Plaintiff was employed on The

Intergovernmental Fiscal Analysis Project, a federally funded research project on government finance matters, housed within The University of Michigan and administered by the Defendant Board of Regents' agent, faculty project director, Thomas J. Anton.

13. Defendant Anton, Plaintiff Cawley, and another graduate student, Mr. Kevin L. Kramer, together constituted the core staff of said project, and jointly or seperately were responsible for most project research activities and scholarly publications.

14. It is the express policy of the Defendant Board of Regents to encourage all University-based research projects, such as The Intergovernmental Fiscal Analysis Project (The IFAP Project).

15. To this policy end, The University of Michigan maintains an open OFFER to

all faculty and apprentice graduate students associated with any faculty member to provide administrative support for all faculty and graduate student initiated research projects and prestigious Seal of University affiliation, if said faculty and graduate students can obtain extramural financing of their research programs, and in exchange for valuable consideration of promise of involved faculty and graduate students to adhere to University of Michigan scholarship integrity policies in all their research activities and publications.

16. In exchange for University of Michigan administrative support and seal of affiliation, The Intergovernmental Fiscal Analysis Project team researchers assumed an obligation to abide by University scholarship integrity

policies.

17. One component of University of Michigan scholarship integrity policies concern intellectual property rights ownership.

(End p. 2; begin p. 3)

18. To further encourage scholarly publications by its faculty and graduate students, in furtherance of The University of Michigan's nationwide reputation as a major scholarship university, it is express policy of the Defendant Board of Regents to cede to the actual authors of such publications any and all federal copyright rights of ownership and/or complementary state law intellectual property rights and scholarship craft trade practice rights, even if said publications arise, in part, from normal employment duties of faculty or graduate student researchers.

19. Said University of Michigan intellectual property rights policy complements general United States Government extramural sponsorship grant/ contract policies, wherein, save by express reservation of the United States Government, the United States Government ceded any and all intellectual property rights to the faculty and graduate student authors of the publications financed under federal grants/contracts.

20. All of the nation's colleges and universities and independant research institutes adhere to the above generic scholarship integrity and intellectual property rights principles.

21. All Intergovernmental Fiscal Analysis Project publications and ongoing researchactivities were subject to the above intellectual property rights principles and specific University of

Michigan policies.

22. Under University of Michigan policies, responsibility for abiding with such policies in all research project scholarly enterprises expressly lies with each and every involved University community researcher, subject to faculty project director strict liability for enforcing said policies.

23. As part of a continuous and systematic progress of research pursuant the above policies, from September 1978 thru August 1980, Defendant Anton, plaintiff and others engaged in various research activities, funded by a $200,000.00 U.S. Department of Housing and Urban Development grant/contract. Various publications resulted; pther publications were in-progress.

24. Beginning in September 1980, thru May 1983, a grant of $300,000.00 from

the U.S. National Science Foundation, thru the liason of Defendant Trudi C. Miller, was secured to continue IFAP Project activities, supplemented later by private foundation monies.

25. The transition from U.S. Housing and Urban Development 1978-80 funding to U.S. National Science Foundation 1980-83 funding of the IFAP Project involved the execution of a seperate research contract by Defendant

(End p. 3; beginning p. 4)

Anton with the assistance of Plaintiff Cawley funded by Defendant Miller's U.S. National Science Foundation office thru the Municipal Finance Officers Association in Washington, D.C., predisposing subsequent National Science Foundation funding of the IFAP Project thru Defendant Miller's office.

26. In early 1979, using discretionary

funds from her U.S. National Science Foundation Division of Applied Research, Defendant Miller contracted with the Municipal Finance Officers Association (1) to hold a series of conferences bringing together scholars and governmental officials on key governmental finance topics, (2) to assist Defendant Miller in locating key scholars to write literature review analysis on each such topical area, and (3) to aid Defendant Miller in locating a press to publish said collection of literature review analyses under the editorship of Defendant Miller. (The NSF contract papers are public information in Defendant Miller's possession.)

27. Defendant Miller orally and in writing amplified upon this project's organization as follows:

1) a contract to produce a literature

review article would be entered into by the Municipal Finance Officers Association (MFOA) and individual main authors, with leave to the main authors to contract with co-authors and/or junior graduate student research co-workers;

2) a further, seperate contract between Defendant Miller and each literature review article author or team of authors would be entered into to not publish said literature review articles anywhere other than the symposium volume to be edited by Defendant Miller, abscent permission;

3) all federal and state intellectual property rights would be ceded to the authors of each literature review article.

Initially, MFOA acted as clearinghouse agent for said matters, but Defendant Miller assumed the leading role thereafter.

28. The above is a standard conference organizer's dual contract arrangement within the academic world; only Defendant Miller's NSF employment and the role of NSF funding distinguishes the practice.

29. On or about January 15, 1979, thru the MFOA, Defendant Miller caused a contract to produce a literature review article on Intergovernmental Change in the United States to be entered into by Defendant Anton and the MFOA.

30. Pursuant University of Michigan policies, described above, Defendant Anton in turn entered into a contract with Plaintiff Cawley to assist Defendant Anton in the production of said

literature review manuscript,

(End p. 4; begin p. 5)

subject to

the following terms:

1) Plaintiff Cawley was to be a junior, graduate student apprentice co-author, with the article published under ownership title of Thomas J. Anton with The Assistance of Jerry P. Cawley;

2) Plaintiff Cawley was to receive no monetary compensation for his research efforts beyond his normal .75 or so continuing IFAP Project University of Michigan employment pay;

3) Plaintiff Cawley was to continue routine labors on ongoing 1979-80 U.S. Housing and Urban Development financed project work while working on the joint manuscript, save for a

brief period of time allotted from regular project work to the manuscript's production;

4) in exchange for forebearance of monetary compensation for his labors in producing said manuscript, Plaintiff Cawley received junior co-author ownership title to the manuscript;

5) Defehdant Anton retained final control and responsibility for the substantive contents of the manuscript, subject to advice from Plaintiff Cawley;

6) Plaintiff Cawley was responsible for conducting the review of the literature, establishing a bibliography of references, drafting footnotes to the text, culling together empirical data bases relied upon in the text and supporting

tables, submitting unguided first drafts of substantive sections of the text to Defendant Anton, writing assigned sections of the manuscript text, and overseeing the computer based production of the text.

31. Defendant Miller and MFOA approved of the contract to produce said manuscript between Defendant Anton and Plaintiff Cawley, announcing the formed contract orally and in writing as an April 1979 Washington, D.C. conference at the U.S. National Science Foundation organized around manuscript topic, where at Defendant Anton and Plaintiff Cawley were joint reporters of the conference.

32. At said April 1979 conference orally and in writing in the conference proceedings, Defendant Miller also announced the formation of a further

contract between her and Defendant Anton and Plaintiff Cawley to publish the resultant literature review manuscript in a symposium volume to be edited by her.

33. A first draft of said joint manuscript was completed by April, 1980, for a second NSF sponsored conference organized around the essay that was held at The University of Michigan at Ann Arbor. Reviewer comments were then receive(d); Defendants Anton and Miller both re-affirmed the above contracts.

34. In September, 1980, a final, pre-publication print of the manuscript prior to final press required editorial revisions was released under formal University of Michigan seal (copy in the possession of all defendants):

--Thomas J. Anton, with The Assistance of Jerry P. Cawley, Intergovernmental

Change in the United States: Myth and Reality

(End p. 5; begin p. 6)

(Ann Arbor, Michigan: The University of Michigan, Ph.D. Program in Urban and Regional Planning, The Intergovernmental Fiscal Analysis Project, September 1980)

35. Said manuscript, upon completion, was delivered to Defendant Miller for forthcoming publication in the symposium volume she was to edit.

36. Pursuant University of Michigan rules and national scholarship craft customs, Plaintiff Cawley entrusted into the fiduciary duty of care of Defendant Anton the charge of overseeing the due publication of said joint 1980 manuscript, with proper copyright ownership credit and protection, in the

symposium volume to be edited by Defendant Miller.

37. Thereafter, beginning in the Fall of 1980, a long simmering dispute within the IFAP Project erupted, involving various charges of multiple scholarship integrity violations by Defendant Anton and other, among other matters, by Plaintiff Cawley to University of Michigan officials and U.S. National Science Foundation officials. In addition, Plaintiff Cawley complained of various federal research grant money mis-management practices by Defendant Anton and Defendant Miller relating to charges of improper U.S. National Science Foundation monitoring of the IFAP Project activities by Defendant Miller, including the tacit deal between Defendant Miller and Defendant Anton that, as prelude to Defendant Anton

receiving a $300,000.00 research grant from Defendant Miller's NSF office, Defendant Anton would publish an article by Defendant Miller in the international journal, Policy Sciences, that he edited at the time, as well as take part in the above MFOA orchestrated NSF contract to produce a symposium volume edited by Defendant Miller of NSF.

38. On behalf of Defendant Anton, The University of Michigan refused to hear Plaintiff Cawley's grievances. The National Science Foundation took no apparent remedial action. And, Defendant Anton orchestrated the termination of Plaintiff from his University of Michigan IPAP Project employment, severing all contacts among Plaintiff, and Defendants Anton and Miller.

39. On or about November 17, 1985, at the Barnes and Noble University of

Michigan Union bookstore, Plaintiff Cawley purchased a $12.95 paperback edition of the following Defendant Miller edited symposium volume, discovering upon purchase the below cited publication of said joint Anton and Cawley 1980 Intergovernmental Change in the United States

(End p. 6; begin p. 7)

manuscript in said Defendant Miller symposium volume under sole author ownership title of Defendant Anton, absent any recognition of Plaintiff Cawley's junior co-author ownership title,:

--Thomas J. Anton, "Intergovernmental Change in the United States: An Assessment of the Literature," in Trudi C. Miller, ed., Public Sector Performance: A Conceptual Turning Point (Baltimore and London: The

Johns Hopkins University Press, 1984), at pages 15-64.

40. Said Miller symposium version of the joint 1980 manuscript is substantially the identical manuscript, save for some minor editorial changes typical of final press preparation of any manuscript, the minor updating in time of some empirical data (not always cited correctly), a scaled down bibliography and set of footnotes, with some excised portions of the original text being replaced by a page or so of new material. (Copy of said book in possession of all defendants.)

41. Plaintiff Cawley thereupon demanded of the various defendants, thru the various defendants, appropriate remedy of said removal of his proper scholarship craft junior co-author ownership title. No remedial offers were

forthcoming.

42. Plaintiff also began measures to secure federal copyright protection for the unpublished joint Anton with Cawley 1980 manuscript, since, upon discovery of said Miller symposium volume, it became apparent that neither Defendant Anton nor Defendant Miller adhered to the prior agreements to secure appropriate copyright registration and protection for the work.

43. As a result of said conduct by the defendants individually or jointly, Plaintiff Cawley was unjustly deprived of proper junior co-author ownership title in the press published version of the 1980 joint manuscript, the 1984 Miller symposium volume's publication of the Anton sole author version of said manuscript rendered the unpublished manuscript academically worthless as a

means of establishing Plaintiff's academic reputation as a junior scholar, and the dropping of plaintiff's name from the title, given Plaintiff's whistleblowing grievances against Defendants Anton and Miller each, in effect discredits the academic merits of Plaintiff's grievances falsely, thereby further harming Plaintiff's academic trade opportunities beyond the lost labor and disbursement efforts he invested in producing the 1980 manuscript with Defendant Anton.

(End p. 7; begin p. 8)

COUNT 1

44. Plaintiff hereby incorporates the allegations of paragraphs 1 thru 43 above as though fully set out herein.

45. Plaintiff's contract with Defendant Anton to produce the manuscript

Intergovernmental Change in the United States and then publish said manuscript or derivative manuscript insubstantially different from said manuscript under joint title of co-authoring ownership of Defendant Anton with The Assistance of Plaintiff Cawley, as described above, contained the obligations described in paragraphs 29 thru 32, and 36 above.

46. Defendant Anton breached said obligations by virtue of Dr. Anton's conduct described in paragraphs 39 thru 42 above, whereby he published or caused to be published said manuscript or derivative manuscript insubstantially different from said manuscript under his sole title of ownership, absent mention of Plaintiff's junior co-authorship title, in the 1984 symposium volume Public Sector Performance.

47. Defendant Board of Regents, and/or

Defendant Brown University, each by and through its faculty agent, Dr. Anton's conduct, in the alternative to or in addition to any individual liability due Dr. Anton, each are liable for said breach of contract by reason of knowing of said conduct, and condoning it upon proper grievance from Plaintiff.

48. Said breach of contract has directly and proximately caused plaintiff substantial damage, including, but not limited to, the normal and special academic scholarship trade circumstances damages stated above in paragraph 43, and such other damages as may appear during discovery.

WHEREFORE, plaintiff respectfully requests this Court to grant him all legal damages to which he may be entitled, including interest, costs, and reasonable attorneys' fees, together with

such specific performance, injunctive relief, or other equitable relief as may be just under the circumstances.

COUNT 2

49. Plaintiff hereby incorporates the allegations of paragraphs 1 thru 43 above as though fully set out herein.

50. Plaintiff, Defendant Anton, and Defendant Miller, as described above in paragraphs 26-28, and 32, entered into a further, seperate contract than the Count 1 contract to produce said manuscript, contracting to

(End p. 8; begin p. 9)

publish said jointly co-authored Anton with The Assistance of Cawley manuscript, subject to insubstantial press editorial substantive alterations, in and only in a in-progress symposium volume to be

edited by Defendant Miller, actually published in 1984.

51. This agreement imposed the following further obligations upon the three parties involved:

1) all three parties entered into a fiduciary trust relationship, assuming a duty of care not to compete with each other by producing derivative manuscript works for publication elsewhere on the part of Anton and Cawley, or by seeking to not include said joint manuscript within the contributing articles to be published in the symposium volume on the part of Miller;

2) Defendant Anton assumed a fiduciary trust relationship as to plaintiff's interests in assuring proper press publication of the joint manuscript in the forthcoming Miller symposium

volume;

3) Defendant Miller assumed a fiduciary trust relationship relative to both Anton and Cawley as regards the presentation of their creative authorship views as to the substantive contents of the manuscript as revised in format for press publication to press editors.

52. Defendant Miller breached this obligation to plaintiff by virtue of the publication of the 1984 Public Sector Performance symposium volume, abscent inclusion of any mention of plaintiff's junior co-author ownership title in the article published therein under sole Anton title, as described above in paragraphs 39 thru 42.

53. Defendant Anton similarly breached this obligation to plaintiff, seperately from Defendant Miller or in league with

her, by virtue of the conduct described in paragraphs 39 thru 42, above.

54. Defendant Board of Regents, and/or Defendant Brown University, such by and through its faculty agent, Dr. Anton's conduct, in the alternative to or in addition to any individual liability due Dr. Anton, each are liable for said breach of contract by reason of knowing of said conduct, and condoning it upon proper grievance from plaintiff.

55. Said breach of contract to publish has directly and proximately caused plaintiff substantial damage, including, but not limited to, the normal and special academic scholarship trade circumstances damages stated above in paragraph 43, and such other damages as may appear during discovery.

WHEREFORE, plaintiff respectfully requests this Court to grant him all legal damages to which he may be entitled, including interest, costs, and reasonable attorneys's fees, together with such specific performance, injunctive relief, or other equitable relief as may be just under the circumstances.

(End of p. 9; begin p. 10)

COUNT 3

56. Plaintiff hereby incorporates the allegations of paragraphs 1 thru 43, and 51 above as though fully set out herein.

57. That in the professional scholarship craft trade, the publication is the cardinal vehicle of academic commerce, and the chief objective indicator of any individual's, senior faculty like Defendants Anton or Miller, or junior

graduate student apprentice like Plaintiff Cawley, academic trade market reputational business value as a scholar of integrity and quality by virtue of a demonstrated record of accomplishment.

58. Plaintiff and Defendants Anton and Miller each, as stated in paragraphs 26 thru 32, agreed to publish the joint Anton with Cawley 1980 manuscript in a symposium volume being readied by Miller.

59. That said symposium volume edited by Defendant Miller was published in 1984 by The Johns Hopkins University Press, by and thru its agents.

60. That said symposium volume did NOT in fact publish the agreed to joint Anton with Cawley manuscript, as described in paragraphs 39 thru 42 above, in violation of fiduciary dities not to compete owed plaintiff by Defendants Anton and Miller each, as described in paragraph

51.

61. That said publication of the 1984 Miller symposium volume abscent plaintiff's junior co-authorship ownership title in the therein published Anton article was an improper scholarship trade practice act of retaliation by Defendants Anton and Miller each and/or jointly, against plaintiff for plaintiff's prior, factually just whistleblowing to University of Michigan, National Science Foundation, U.S. Justice Department and State Attorney General's Office in Michigan about alleged improper Anton and Miller acts,

62. Defendant Board of Regents, and/or Defendant Brown University, each by and through its faculty agent, Dr. Anton's conduct, in the alternative to or in addition to any individual liability due Dr. Anton, each are liable for the

conduct of their agent.

63. Said conduct constitutes unfair competition under national academic scholarship trade practice standards by Defendants Anton and Miller, and has directly and proximately caused plaintiff substantial damage, including, but not limited to, the normal and special academic scholarship trade circumstances damages stated above in paragraph 43, and such other damages as may appear during the course of discovery.

WHEREFORE, plaintiff respectfully requests this Court to grant him

(End p. 10; begin p. 11)

all legal damages to which he may be entitled, including interest, costs, and reasonable attorneys's fees, together with such specific performance, injunctive relief, or other equitable relief

as may be just under the circumstances.

COUNT 4

64. Plaintiff hereby incorporates the allegations of paragraphs 1 thru 43, 45-48, 50-54, above as through fully set out herein.

65. Under the terms of the contract agreements between Plaintiff and Defendant Anton to produce the 1980 joint manuscript, as described in paragraphs 45 thru 48, and between Defendants Anton and Miller and plaintiff to publish said specific 1980 joint manuscript, as described in paragraphs 50 thru 54, Defendants Anton and Miller each owed plaintiff a fiduciary trust relationship duty of care to see that the symposium volume edited by Defendant Miller included said 1980 joint manuscript published under both co-auth-

ors' appropriate title of ownership.

66. The initial drafts of said 1980 joint manuscript forwarded to The Johns Hopkins University Press and its agents by Defendant Anton and Miller contained plaintiff's name on the title.

67. Additionally, custom of national academic scholarship trade practice imposes said same fiduciary duty of care upon Defendants Anton, Miller, Johns Hopkins University, by and thru its agents, in that

1) historically, proper attribution of author ownership title credit of professional scholarship pieces has been considered a major academic trade practice duty of all involved parties, the authors, volume editors, presses and universities;

2) historically, senior academic practitioners, like Defendants Anton

and Miller each, owe a special master to apprentice duty of care to graduate student co-authors, like plaintiff, as to the adherence to proper scholarship trade practices;

3) historically, volume editors, press editors and university press publishers, like Johns Hopkins University Press and its agents, have owed a special fiduciary duty of care to the general academic readership of such works to police said works to assure that minimumly acceptable professional scholarship integrity and quality standards of craft practices are adhered to by contributing authors and volume editors of such volumes.

68. That Defendants Anton, Miller, Johns Hopkins University, by and thru its agents, each and/or jointly wilfully,

or recklessly, or negligently violated said fiduciary trust duty of care to plaintiff by virtue of the unconsented to excising of his name as a junior co-author ownership title holder to the Anton contribution to Public Sector Performance volume.

(End p. 11; begin p. 12)

69. Defendant Board of Regents, and/or Defendant Brown University, each by and through its faculty agent, Dr. Anton's conduct, in the alternative to or in addition to any individual liability due Dr. Anton, each are liable for the conduct of their agent.

70. Said conduct by defendants individually and/or jointly has directly and proximately caused plaintiff substantial damage, including, but not limited to, the normal and special academic scholarship trade circumstances

damages stated in paragraph 43 and such other damages as may appear during the course of discovery.

WHEREFORE, plaintiff respectfully requests this Court to grant him all legal damages to which he may be entitled, including interest, costs, and reasonable attorneys's fees, together with such specific performance, injunctive relief, or other equitable relief as may be just under the circumstances.

COUNT 5

71. Plaintiff hereby incorporates the allegations of paragraphs 1 thru 43 above as though fully set out herein.

72. On or about January 15, 1979 thru on or about September 30, 1980, Defendant Anton employed the plaintiff to perform the various academic research

tasks stated above in paragraph 30, pursuant general University of Michigan rules of employment.

73. Above and beyond his normal work-for-hire University of Michigan duties, for the most part, plaintiff executed said tasks abscent normal pay compensation, under agreement to forebear pay in exchange for junior co-author ownership title in the joint 1980 Anton with Cawley manuscript, as well as disbursements for costs of said research tasks from pocket money.

74. Defendant Anton's failure to effect publication of said 1980 joint Anton with Cawley manuscript under joint co-authorship title in the 1984 volume Public Sector Performance, as described in paragraphs 39 thru 42 above, but publication of said work under his sole author ownership title, constitutes

unjust enrichment of Defendant Anton's academic reputation and, in effect, renders plaintiff after-the-fact of production of said joint 1980 manuscript without pay compensation due him by virtue of negating plaintiff forebearance of pay in exchange of junior co-author ownership title employment agreement with Defendant Anton.

(End p. 12; begin p. 13)

75. Defendant Board of Regents, and/ or Defendant Brown University, each by and through its faculty agent, Dr. Anton's conduct, in the alternative to or in addition to any individual liability due Dr. Anton, each are liable for the conduct of their agent.

76. Said conduct by Defendant Anton, in effect, cost plaintiff the following amount of lost labors and costs:

1) over a period of 21 calendar months, some 2,080 hours of work beyond normal University employment duties, compensatable at a standard professional research assistance rate of $10.00 an hour, herein increased to $15.00 an hour in recognition of the overtime nature of the work effort, or some $31,200 in lost wages;

2) in addition, plaintiff expended some $5,000 amidst said research tasks in securing copies of reviewed literature, constructing empirical, computerized data bases, buying supplies and covering home office overhead expenses.

WHEREFORE, plaintiff respectfully requests this Court to grant him judgmwnt against Defendant Anton in the sum of $36,200.00, interests, costs,

attorneys's fees, plus any other equitable relief the Court feels just and proper under the circumstances.

COUNT 6

77. Plaintiff hereby incorporates the allegations of paragraphs 1 thru 43, and 51 above, as though fully set out herein.

78. Plaintiff had a contract to publish said joint Anton with Cawley 1980 manuscript in the 1984 Public Sector Performance symposium volume edited by Defendant Miller with Defendant Miller, as set forth above.

79. Defendant Anton was aware of said contract, being party to said contract with plaintiff, as well as plaintiff's fiduciary agent in carrying out said contract with Defendant Miller.

80. Defendant Anton, acting in breach of his contract duties and fiduciary

duties to plaintiff, maliciously interfered with said contract relationship between plaintiff and Defendant Miller, as stated above in paragraphs 37 thru 42.

81. Said actions by Defendant Anton had the intended effect of causing the unfulfillment of said contract and thereby causing the derivative

(End p. 13; begin p. 14)

future advantage harms to have reasonably issued from fulfillment of said contract to befall plaintiff as stated in paragraph 43.

82. Defendant Board of Regents, and/or Defendant Brown University, each by and through its faculty agent, Dr. Anton's conduct, in the alternative to or in addition to any individual liability due Dr. Anton, each are liable for the conduct of their agent.

WHEREFORE, plaintiff respectfully requests this Court to grant him all legal damages to which he may be entitled, including interest, costs, and reasonable attorneys's fees, together with such specific performance, injunctive relief, or other equitable relief as may be just under the circumstances.

COUNT 7

83. Plaintiff hereby incorporates the allegations of paragraphs 1 thru 43, and 51 above, as though fully set out herein.

84. That plaintiff was and remains proper legal junior co-author owner of the title to said 1980 joint Anton with Cawley manuscript, whose production is described above in paragraphs 26 thru 35.

85. That, independent of secondary

considerations as to improper reproduction of the contents of said 1980 joint manuscript potentially at issue, plaintiff's junior co-author ownership title in said manuscript constituted for him, an apprentice graduate student scholar just embarking on a professional trade career,

1) his professional reputational name trade mark as a scholar of integrity and quality;
2) scholarly currency as objective way of certifying his accomplishment as a scholar;
3) prior to formal press publication, pre-empted by defendants' conduct described below, in the nature of a trade secret, subject to fiduciary duty of confidential usage only, abscent consent otherwise, by the

senior co-author, as agreed to.

86. That Defendant Anton's pre-emptive publication of said joint 1980 manuscript in the 1984 volume, Public Sector Performance, as described in paragraphs 39 thru 42, represents an improper scholarship trade practice act reaching deeper than mere reproduction of materials, constituting a malicious, continuing trespass to plaintiff's lawfully protected intellectual property rights to

(End p. 14; bwgin p. 15)

1) his scholarship trade mark title of ownership;
2) the objective academic certification of scholarly achievement signified by the joint co-author title; and
3) the pre-consented to trade secret ideas embodied within the joint 1980 manuscript.

87. Defendant Anton's conduct was known to Defendants Miller, Johns Hopkins University, by and thru its agents, Board of Regents, Brown University each, and condoned or aided and abetted by the same individual defendants, all of whom ignored plaintiff's remedial grievances.

WHEREFORE, plaintiff respectfully requests this Court to grant him all legal damages to which he may be entitled, including interest, costs, and reasonable attorneys's fees, together with such specific performance, injunctive relief, or other equitable relief as may be just under the circumstances.

COUNT 8

88. Plaintiff hereby incorporates the allegations of paragraphs 1 thru 43, and 51 above, as though fully set out herein.

89. Plaintiff further hereby incorporates the allegations of Count 7, at paragraphs 84 thru 87 above, as though fully set out herein, with the AMENDMENT that, instead of being a claim for trespass, COUNT 8 repleads the same facts as Count 7 as stating a claim for malicious, or fraudulent conversion of intellectual property rights.

WHEREFORE, plaintiff respectfully requests this Court to grant him all legal damages to which he may be entitled, including interest, costs, and reasonable attorneys's fees, together with such specific performance, injunctive relief, or other equitable relief as may be just under the circumstances.

COUNT 9

90. Plaintiff hereby incorporates the

allegations of paragraphs 1 thru 43, and 51 above, as though fully set out herein.

91. Defendant Johns Hopkins University, by and thru its agents, was on November 17, 1985, and still is engaged in the operation of a university, scholarly publishing house press that offers for sale to the general national and state academic community various works of scholarship said to be as meritorious in quality and integrity as the esteemed academic

(End p. 15; begin p. 16)

continuing authors and volume editors.

92. Defendant Johns Hopkins University Press, by and thru its agents, and on behalf of contributing editor, Defendant Miller, and contributing author, Defendant Anton, so certified to the academic community the 1984 volume,

Public Sector Performance, representing that the volume was of unblemishingly high quality and integrity and worthy of reliance on for the factual representations and opinions stated therein by the academic community.

93. On or about November 17, 1985, plaintiff purchased a $12.95 paperback edition of said book at The University of Michigan Union, Barnes and Noble bookstore based on said representations.

94. Said volume, however, as known before publication to the above defendants in each case, was not a volume of acceptable scholarship integrity or quality by national academic standards:

1) the volume inversely misrepresented as Defendant Anton's sole scholarship achievement an article jointly co-authored with plaintiff, absent

recognition of plaintiff's proper academic authorship achievement, as stated above;

2) the volume proffered various factually inaccurate reports of where the empirical data Anton relied on and reported in said article derived from, thereby rendering the reported materials worthless to consuming scholars and placing the entire volume in suspect light;

95. Notice of said defects was tendered to the Johns Hopkins University Defendant, by and thru its agents, and thru them to the other defendants named above, but remedial action on said product deficiencies was refused plaintiff.

96. That as a result of such passing off scholarship trade practice of inferior and improper scholarship,

crediting authors for unlisted author's work and certifying as warrented for scholarship consumption scholastically unmeritorious work, said product and attendant conduct in causing the marketing of said product constitutes a violation of state common law tort prohibiting inverse misappropriation and deceptive, fraudulent advertising of scholarship craft products.

(End p. 16; begin p. 17)

97. As to plaintiff Cawley specifically, said product

1) misappropriates and markets within the academic community work jointly done by him and Defendant Anton under false and misleading title of sole Anton authorship;

2) implies to the academic marketplace, that the dropping of plaintiff's junior co-authorship title to said

article, in the face of earlier widespread publicity foreshadowing the joint contribution, that plaintiff may be responsible for the obvious professionally incompetent factual reporting of empirical data in said article that, in truth, Defendant Anton solely effected in altering insubstantially the 1980 joint Anton with Cawley manuscript in question,

3) thereby causing directly or proximately the range of scholarship craft trade harms stated above in paragraph 43.

98. Defendant Board of Regents, and/or Defendant Brown University, each by and through its faculty agent, Dr. Anton's conduct, in the alternative to or in addition to any individual liability due Dr. Anton, each are liable for the

conduct of their agent.

WHEREFORE, plaintiff respectfully requests this Court to grant him all legal damages to which he may be entitled, including interest, costs, and reasonable attorneys's fees, together with such specific performance, injunctive relief, or other equitable relief as may be just under the circumstances.

Signature: Jerry P. Cawley 4-23-87
Plaintiff, pro per Date

Address: Mr. Jerry P. Cawley
Old address omitted
herein to prevent
needless confusion.